

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 168.

THE AMERICAN SURETY COMPANY OF NEW YORK,
PLAINTIFF IN ERROR,

vs.

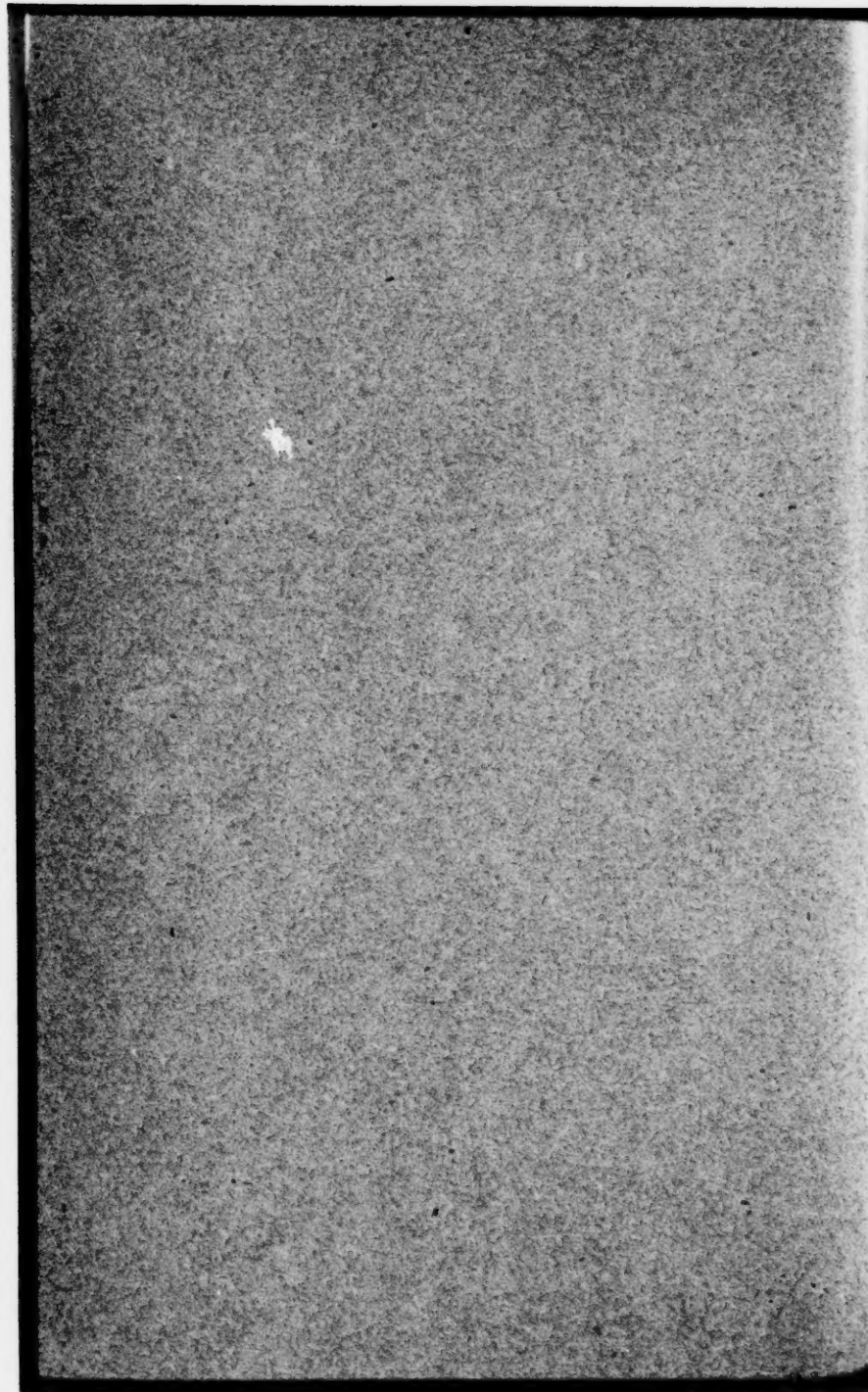
FREDERICK N. PAULY, AS RECEIVER OF THE CALIFOR-
NIA NATIONAL BANK OF SAN DIEGO, CALIFORNIA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

FILED MAY 2, 1898.

(16,279.)

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1265



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a

(No. 1.)

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The American Surety Company of New York, plaintiff in error, and Frederick N. Pauly, as receiver of the California National Bank of San Diego, California, defendant in error (No. 1), a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

[Seal of the Supreme Court of the United States.]

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

Allowed, to operate as a supersedeas on filing bond of \$20,000.

R. W. PECKHAM,

Associate Justice of the Supreme Court of the United States.

b

[Endorsed:] United States circuit court of appeals, second circuit. Filed Apr. 16, 1896. James C. Reed, clerk.

Frederick N. Pauly, as receiver of the California National Bank of San Diego California, hereby acknowledges due and sufficient personal service of the within writ of error this 17th day of April, 1896.

FREDERICK N. PAULY,

*As Receiver of the California National Bank of
San Diego, California,*

By GEO. M. COFFIN,

Deputy & Acting Comptroller of Currency.

— — —, *Attorney, and*

By EDWARD MITCHELL, *Attorney.*

(a)

UNITED STATES OF AMERICA, }
Southern District of New York, } ss :

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 1 to 349, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The American Surety Company of New York, plaintiff in error, against Frederick N. Pauly, defendant in error (action No. 1), as the same remain- of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this first day of May, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twentieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

JAMES C. REED, *Clerk.*

c United States Circuit Court of Appeals for the Second Circuit.

AMERICAN SURETY COMPANY, Plaintiff in Error, }
vs. }
FREDERICK N. PAULY, Defendant in Error. }

(Action No. 1.—O'Brien, cashier.)

Transcript of Record.

Error to the circuit court of the United States for the southern district of New York.

Printed under the direction of the clerk.

[Stamped :] United States circuit court of appeals, second circuit.
Filed May 25, 1896. James C. Reed, clerk.

CITY, COUNTY AND STATE OF NEW YORK, SS.:

WILLIAM C. DOUGLAS, being duly sworn, says: That he is managing clerk in the office of Henry C. Willcox, Esq., attorney for American Surety Company of New York; that on the 3d day of April, 1895, at four o'clock in the afternoon, at the office of Mitchell & Mitchell, No. 44 Wall street, New York City, he served the within writ of error on Mitchell & Mitchell, attorneys for Frederick N. Pauly, as Receiver, &c., by delivering to William Mitchell, of said firm, personally, a true copy of said writ of error, and leaving the same with him.

WILLIAM C. DOUGLAS.

Sworn to before me this 4th }
day of April, 1895.

JOHN C. MOWBRAY,
Notary Public,
Kings Co.
Ctf. filed in N. Y. Co.



THE

1

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

THE UNITED STATES OF AMERICA, }
 Second Judicial Circuit, } ss.:

THE PRESIDENT OF THE UNITED STATES TO THE
 HONORABLE JUDGES OF THE CIRCUIT COURT OF
 THE UNITED STATES FOR THE SOUTHERN DIS-
 TRICT OF NEW YORK, GREETING:

Because in the record and proceedings, as also in
 the rendition of the judgment, of a plea which is in 2
 the said Circuit Court before you, or some of you,
 between Frederick N. Pauly, as Receiver of the Cali-
 fornia National Bank of San Diego, California,
 plaintiff, and the American Surety Company of New
 York, defendant (Action No. 1), a manifest error
 hath happened, to the great damage of the said
 American Surety Company of New York, defend-
 ant, as by his complaint appears, we being willing
 that error, if any hath been, should be duly cor-
 rected, and full and speedy justice done to the par-
 ties aforesaid in this behalf, do command you, if
 judgment be therein given, that then under your
 seal, distinctly and openly, you send the record and 3
 proceedings aforesaid, with all things concerning
 the same, to the United States Circuit Court of Ap-
 peals for the Second Circuit, together with this writ,
 so that you have the same in New York City, in
 said Circuit, on the 30th day of April next, in the
 said Circuit Court of Appeals, to be then and there
 held; that the record and proceedings aforesaid being
 inspected, the said Circuit Court of Appeals may
 cause further to be done therein to correct that
 error, what of right, and according to the laws and
 customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief

- 4 Justice of the United States, this 1st day of April, 1895, and in the one hundred and nineteenth year of the Independence of the United States of America.

Attest:

JOHN A. SHIELDS,
Clerk.

[SEAL.]

Allowed:

E. H. LACOMBE,
Circuit Judge.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

- 5 I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 5 to 360 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of American Surety Company, of New York, plaintiff in error, against Frederick N. Pauly, as Receiver of the California National Bank of San Diego, California, defendant in error, as the same remain of record and on file in said office.

- In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 13th day of April, in the
6 year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

JOHN A. SHIELDS,
Clerk.

[SEAL.]

(Endorsed)—United States Circuit Court of Appeals for the Second Circuit.—American Surety Company, of New York, Plaintiff in Error, against Frederick N. Pauly, as Receiver, &c., Defendant in Error.—Action No. 1.—Writ of Error.—Henry C. Willcox, Attorney for Plaintiff in Error, No. 160 Broadway, New York City, N. Y.—Due and sufficient service of a copy of the within Writ of Error is hereby admitted this 3d day of April, 1895.

UNITED STATES CIRCUIT COURT

7

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California,

Plaintiff,

AGAINST

AMERICAN SURETY COMPANY OF NEW YORK,
Defendant.

Action No. 1.

8

TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of New York, this 8th day of May, in the year one thousand eight hundred and ninety-three.

JOHN A. SHIELDS,

[L. S.]

Clerk.

MITCHELL & MITCHELL,

Plaintiff's Attorneys.

Office and Post Office address,

45 and 47 Wall Street,

New York City.

10

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California,

Plaintiff,

AGAINST

11 AMERICAN SURETY COMPANY OF
NEW YORK,
Defendant.

Action No. 1.

The plaintiff above named, by Mitchell & Mitchell, his attorneys, complaining of the defendant herein, respectfully shows to this Court on information and belief:

12 I.—That at the times hereinafter mentioned up to about the 18th day of December, 1891, the California National Bank of San Diego, California, was a banking institution duly organized and existing under an act of Congress of the United States, commonly known as the National Banking Act, and acts amendatory thereof, and was a bank of discount and deposit engaged in the transaction of such business under the name of the California National Bank of San Diego, California, in the said City of San Diego, California.

II.—That on or about the 18th day of December, 1891, the said California National Bank of San Diego, California, being insolvent and being unable to meet its just debts and liabilities, the plaintiff above named was duly appointed Receiver of the said bank by the Comptroller of the Currency of the United

States, thereunto duly authorized by law in such cases made and provided, and this plaintiff has since the date of such appointment entered upon the discharge of his duties as such Receiver, and is duly authorized and empowered to bring this action, and instructed and directed by the Comptroller of the Currency of the United States so to do. 13

III.—That at all the times hereinafter mentioned the defendant was and still is a domestic corporation duly organized and existing under the laws of the State of New York and carrying on and transacting business in the City of New York, in the State of New York, being engaged in the business, among other things, of issuing surety or guarantee bonds for persons in positions of public or private trust throughout the United States and in Canada, and is a citizen, resident and inhabitant of the Southern District of New York. 14

IV.—That on or about the first day of July, 1891, one George N. O'Brien having been appointed in the service of the California National Bank of San Diego, California, and having been assigned to the office or position of cashier of said bank, the defendant above named duly executed and delivered to the said California National Bank of San Diego, California, a guarantee bond, a copy of which is hereto annexed and marked "A" for identification, and made a part of this complaint. 15

V.—That the said George N. O'Brien entered upon the discharge of his duties as cashier of said bank as aforesaid mentioned, and continued to act as such cashier between the 1st day of July, 1891, and about the 18th day of December, 1891.

VI.—That between the 1st day of July, 1891, and about the 18th day of December, 1891, the said George N. O'Brien, while employed as cashier of said bank as heretofore mentioned, and during the

- 16 continuance of said bond, defrauded said bank of and wrongfully and fraudulently misappropriated and aided in the wrongful and fraudulent misappropriation of moneys, securities and other personal property belonging to said bank and in the possession of the said O'Brien as cashier, and for the possession of which he was responsible, amounting in value to an amount far exceeding the sum of fifteen thousand dollars, and the said bank during the continuance of said bond sustained pecuniary loss of money, securities or other personal property in the possession of said O'Brien, or for the possession of which he was responsible during the continuance of said bond, by acts of fraud and dishonesty on the
- 17 part of the said O'Brien in connection with the duties of the office or position referred to in said bond during the period between the times last above mentioned in the amount of over fifteen thousand dollars.

VII.—That between the dates last above mentioned the said George N. O'Brien, while employed as cashier of said bank as heretofore mentioned, and during the continuance of said bond, embezzled, abstracted and willfully misapplied moneys, funds or credits of said bank, and, without any authority from the directors of said bank, issued and put forth certain certificates of deposit, and, without the authority of the directors of such bank, issued and put in circulation notes of said bank and made false entries in

18 the books of said bank with the intent to injure and defraud said bank, and to deceive an officer or officers of said bank, and any agent appointed to examine the affairs of said bank, by reason of which the said bank suffered pecuniary loss in a sum far exceeding fifteen thousand dollars.

VIII.—That between the dates last above mentioned the said George N. O'Brien, while employed as cashier of said bank as heretofore mentioned, and during the continuance of said bond, aided and abetted the president of said bank, one John W. Collins, in embezzling, abstracting and willfully

misapplying moneys, funds and credits of said bank, 19
and, without any authority from the directors of said
bank aided and abetted the said Collins as such presi-
dent in issuing and putting forth certain certificates
of deposit, and, without authority from the directors
of said bank, aided and abetted the said Collins, as
president, in issuing and putting into circulation
notes of said bank, and in making false entries in
the books of said bank with intent to injure and de-
fraud said bank and to deceive an officer or officers of
said bank and any agent appointed to examine the
affairs of said bank, by reason of which the said bank
suffered pecuniary loss in the sum far exceeding
fifteen thousand dollars.

IX.—That within six months from the dismissal 20
or retirement of the said George N. O'Brien, the
acts of fraud or dishonesty referred to were dis-
covered and defendant notified thereof.

X.—That on or about July 18, 1892, and as soon
as practicable after the occurrence of the aforesaid
wrongful acts of the said O'Brien, this plaintiff duly
mailed at San Diego, California, in an envelope ad-
dressed to the said defendant at its office in the City
of New York, a notice, in writing, of the acts of fraud
and dishonesty of said O'Brien, and a written state-
ment of the loss sustained by the said bank by reason
of the acts of fraud and dishonesty of said O'Brien, 21
certified by the plaintiff and based upon the ac-
counts of said O'Brien, and presented satisfactory
proofs of the loss sustained by said bank by reason
of the acts of said O'Brien, during the continuance
of said bond, and duly demanded from this defend-
ant that this defendant make good and reimburse
to this plaintiff the sum of fifteen thousand dollars,
the amount of pecuniary loss sustained by said bank
by reason of the acts of fraud and dishonesty of said
O'Brien, being the amount conditioned to be paid by
the terms of said guarantee bond heretofore men-
tioned.

22 XI.—That the said defendant received each and all of the papers mentioned in paragraph X. of this complaint on or about July 25, 1892.

XII.—That the said defendant has retained in its possession each and all of the papers mentioned in paragraph X. of this complaint since the receipt thereof by said defendant, and has never up to the time of the commencement of this action objected thereto, either to this plaintiff or to said bank, as not being sufficient as a notice or statement of loss or proofs of loss, as provided by the said bond heretofore mentioned, nor has said defendant raised any objection of any kind or nature whatsoever thereto,
23 either to this plaintiff or to the said bank.

XIII.—That this plaintiff and the California National Bank of San Diego, California, have duly performed all the conditions and provisos of said guarantee bond on his and its part required to be performed.

XIV.—That the said defendant has neglected and refused to pay to this plaintiff the said sum of fifteen thousand dollars or any sum whatever, although requested so to do, and although justly indebted to this plaintiff in the sum of fifteen thousand dollars.

24 Wherefore, the plaintiff demands judgment against the defendant for the sum of fifteen thousand dollars, with interest thereon from October 25, 1892, besides costs and disbursements of this action.

MITCHELL & MITCHELL,

Attorneys for Plaintiff,

45 and 47 Wall St.,

New York City.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

WILLIAM MITCHELL, being duly sworn, says: That he is a member of the firm of Mitchell & Mitchell, attorneys for the plaintiff in the above entitled ac-

tion, and attorney and of counsel for the plaintiff 25
 herein; that he has read the foregoing complaint,
 and knows the contents thereof, and the same is
 true to his own knowledge, except as to the matters
 therein stated to be alleged upon information and
 belief, and as to those matters he believes it to be
 true. The reason why this verification is not made
 by the plaintiff is that the said plaintiff is not a
 resident of this State, and is not now within the
 City and County of New York, where this deponent
 has his office for the transaction of business.

That the grounds of belief as to all matters not
 stated upon his knowledge are letters received from
 the plaintiff in this action and copy of extracts from
 the books of the California National Bank of San 26
 Diego, California, and also the original bond exe-
 cuted and delivered by the defendant in this action
 to the said bank, which is in the possession of depo-
 nent, and copies of or extracts from proofs of loss
 made out by the plaintiff herein.

(Sgd.) WILLIAM MITCHELL.

Sworn to before me this 8th }
 day of May, 1893. }

GUSTAVUS W. RAWSON,
 [L. S.] Notary Public,
 N. Y. City and Co.

— — —
"A."

27

BOND No. 85565.

AMERICAN SURETY COMPANY

OF NEW YORK.

Capital \$1,000,000, fully paid.

General Offices No. 160 Broadway, New York.

Amount \$15,000.

Premium \$75.00.

THIS BOND, made the First day of July, one thou-
 sand eight hundred and ninety-one, between the

28 AMERICAN SURETY COMPANY OF NEW YORK, hereinafter called the "Company," of the first part, and GEORGE N. O'BRIEN, of San Diego, County of San Diego, State of California, hereinafter called the "Employee," of the second part, and CALIFORNIA NATIONAL BANK, San Diego, California, hereinafter called the "Employer," of the third part.

Whereas, the Employee has been appointed in the service of the Employer, and has been assigned to the office or position of Cashier by the Employer, and has applied to the American Surety Company of New York for the grant by it of this Bond:

Now therefore, in consideration of the sum of sevennty-five dollars, lawful money of the United States of America, in hand paid to the Company, as a premium for the term of twelve months ending on the First day of July, one thousand eight hundred and ninety-two, at 12 o'clock noon, it is hereby declared and agreed, that subject to the provision herein contained, the Company shall, within three months next after notice, accompanied by satisfactory proof, of a loss, as hereinafter mentioned, has been given to the Company, make good and reimburse to the Employer all and any pecuniary loss sustained by the Employer, of moneys, securities, or other personal property in the possession of the Employee, or for the possession of which he is responsible, by any act of fraud, or dishonesty, on the part of the Employee, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the Employer's service he may be subsequently appointed, and occurring during the continuance of this Bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal, or retirement of the Employee, from the service of the Employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the Employer, and based upon the accounts of the

Employer, shall be *prima facie* evidence thereof. 31
Provided always, that the Company, shall not be liable, by virtue of this Bond, for any mere error of judgment, or injudicious exercise of discretion on the part of the Employee, in and about all or any matters, wherein he shall have been vested with discretion, either by instruction, or rules and regulations of the Employer. And it is expressly understood and agreed that the Company shall in no way be held liable hereunder to make good any loss which may accrue to the Employer by reason of any act or thing done, or left undone, by the Employee, in obedience to, or in pursuance of any direction, instruction or authorization conveyed to and received by him from the Employer or its duly authorized officer in that behalf; and it is expressly understood and agreed that the Company shall in no way be held liable hereunder to make good any loss by robbery or otherwise, that the Employer may sustain, except by the direct act or connivance of the Employee. 32

The following provisions also are to be observed and binding as a part of this Bond:

That the Company shall be notified in writing, at its office in the City of New York, of any act on the part of the Employee, which may involve a loss for which the Company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the Employer. That any claim made in respect of this Bond shall be in writing, addressed to the Company, as aforesaid, as soon as practicable after the discovery of any loss for which the Company is responsible hereunder, and within six months after the expiration or cancellation of this Bond as aforesaid. And upon the making of such claim, this Bond shall wholly cease and determine as regards any liability for any act or omission of the Employee committed subsequent to the making of such claim, and shall be surrendered to the Company on payment of such claim. 33

- 34 That the Company shall not in any wise be responsible to the Employer under this Bond, to a greater extent than fifteen thousand dollars.

That if the Employer shall at any time hold concurrently with this Bond any other Bond or guarantee of security from or on behalf of the Employee, the Employer shall be entitled in the event of loss by default of the Employee, to claim hereunder only such proportion of the loss as the amount covered by this Bond bears to such other security.

- 35 That if the Company shall so elect, this Bond may be cancelled at any time by giving one month's notice to the Employer, and refunding the premium paid, less a *pro rata* part thereof for the time said Bond shall have been in force, remaining liable for all or any default covered by this Bond, which may have been committed by the Employee, up to the date of such determination, and discovered and notified to the Company within the limit of time hereinbefore provided for.

- 36 That the Employer shall, if required by the Company, and as soon thereafter as it can reasonably be done, give all such aid and information as may be possible (at the cost and expense of the Company), for the purpose of prosecuting and bringing the Employee to justice, or for aiding the Company in suing for and making effort to obtain reimbursement by the Employee or his estate, of any moneys which the Company shall have paid or become liable to pay by virtue of this Bond.

That no suit or proceeding at law or in equity shall be brought to recover any sum hereby insured, unless the same is commenced within one year from the time of the making of any claim on the Company.

That no one of the above conditions, or of the provisions contained in this Bond, shall be deemed to have been waived by or on behalf of the said Company, unless the waiver be clearly expressed in

writing over the signatures of its President and its Secretary, and its seal thereto affixed. 37

That the Company upon the execution of this Bond, shall not thereafter be responsible to the Employer under the obligations of any previous Bond issued upon the Employee; and upon the execution by the Company of any new Bond to the Employer upon said Employee, all the obligations of this Bond shall immediately cease and determine, it being mutually understood that it is the intention of this provision that but one (the last Bond) shall be in force at one time, unless otherwise stipulated between the Employer and the Company.

And the Employee doth hereby for himself, his heirs, executors and administrators, covenant and agree to and with the Company, that he will save, defend and keep harmless the Company from and against all loss and damage of whatever nature or kind, and from all legal and other costs and expenses, direct or incidental, which the Company shall or may at any time sustain or be put to (whether before or after any legal proceedings by or against it, to recover under this Bond, and without notice to him thereof), or for, or by reason, or in consequence of the Company having entered into the present Bond. 38

It is further agreed that this Bond may at the option of the Employer be continued in force from year to year at the same premium rate as long as the Company shall consent to receive the same, in which case the Company shall remain liable for any dishonest act of the Employee occurring between the original date of this Bond and the time to which it shall have been continued. 39

In witness whereof, the said George N. O'Brien (the Employee) hath hereunto set his hand and seal, and the Company has caused this Bond to be signed by its 2nd Vice-President and its Assistant Secretary, and its seal to be hereunto affixed this First day of

40 July, one thousand eight hundred and ninety-one.

GEORGE N. O'BRIEN, [L. S.]
Employee.

DAVID B. SICKELS,
2nd Vice-President.

Signed, Sealed and Delivered }
by Employee, at San Diego, }
Calif., in the presence of }
H. P. GREGOR.
J. E. KELLER.

41 { American }
{ Surety Co. }
{ (S) }

Attest:

WM. A. BRANOF,
Assistant Secretary.

Examined,
W. E. S.

42 (Endorsed)—U. S. Circuit Court for the Southern District of New York.—Frederick N. Pauly, as Receiver, &c., Plaintiff, against American Surety Company of New York, Defendant.—Action No. I.—Summons and Complaint.—Mitchell & Mitchell, Attorneys for Plaintiff, 45 & 47 Wall Street, New York City.—I hereby certify That on the 8th day of May, 1893, at the City of New York, in my District, I personally served the within Summons upon the within named Defendant, American Surety Company of New York, by exhibiting to Henry D. Lyman, Second Vice-President of said Co. the within original, and at the same time leaving with him a copy thereof. And at the same time and place I delivered to and left with him a copy of the annexed complaint.—John W. Jacobus, United States Marshal.—Southern District of New York.—Dated Jul. 28, 1893.—U. S. Circuit Court.—Filed Jul. 28, 1893.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT,

43

SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California,

Plaintiff,

AGAINST

THE AMERICAN SURETY COMPANY OF NEW YORK,
Defendant.

Action No. 1.

44

Please to take notice that the defendant, the American Surety Company of New York, appears in this action, and that I am retained by and appear for the said defendant in this action, and demand that a copy of all papers in this action be served on me at my office, No. 160 Broadway, New York City, N. Y.

Dated May 23, 1893.

Yours, &c.,

HENRY C. WILLCOX,

45

Attorney for Defendant.

Office and Post Office address,

No. 160 Broadway,

New York City, N. Y.

To MITCHELL & MITCHELL, Esqs.,

Plaintiff's Attorneys.

(Endorsed)—Action No. 1.—United States Circuit Court, Southern District of New York.—Frederick N. Pauly, as Receiver of the California National Bank of San Diego, California, vs. The American Surety Company of New York.—

- 46 Notice of Appearance and Demand.—Henry C. Willcox, Defendant's Attorney, 160 Broadway, New York City.—To the Clerk of the United States Circuit Court, for the Southern District of New York.—Please note the appearance of the Defendant, American Surety Company of New York.—U. S. Circuit Court.—Filed Mar. 24, 1893.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

47

FREDERICK N. PAULY as Receiver of the California National Bank of San Diego, California.

Plaintiff,

AGAINST

AMERICAN SURETY COMPANY
OF NEW YORK,
Defendant.

Action No. 1.
(O'Brien,
Cashier.)
Amended
Answer.

48

The American Surety Company of New York, answering the complaint of the plaintiff herein:

1. Upon information and belief, it denies each and every allegation in said complaint contained, not hereinafter specifically admitted.

2. It admits the allegations in the paragraphs or subdivisions of said complaint numbered "I," "III," and "IV".

And for a further, separate and distinct defence, defendant alleges:

3. That in and by the bond or obligation in said 49
complaint set forth it is, among other things, pro-
vided that this defendant, subject to the provisions
therein contained, shall within three months next
after notice, accompanied by satisfactory proof of
loss, as therein mentioned, make good and reimburse
said California National Bank, employer, any pec-
uniary loss by it sustained of moneys, securities or
other personal property in the possession of said
George N. O'Brien, employee, or for the possession of
which he is responsible, by any act of fraud or dis-
honesty on the part of said employee in connec-
tion with the duties of the office or position of
cashier of said bank, therein referred to, occur-
ring during the term of twelve months, ending on 50
the 1st day of July, 1892, at 12 o'clock noon, and
discovered during said term or within six months
thereafter, and within six months from the death
or dismissal or retirement of said employee from the
service of said employer. That the said George N.
O'Brien was dismissed from the service of his said
employer prior to the 13th day of November, 1892;
that the losses in said complaint alleged to have
been by said bank suffered were not of moneys,
securities or other personal property in the posses-
sion of said employee, or for the possession of which
he was responsible, by any act of fraud or dishon-
esty on the part of said employee, in connection
with the duties of his office, nor did such losses occur 51
during the term in said bond provided, nor were
such losses or either of them discovered during such
term, or within six months thereafter, and within
six months from the death or dismissal or retire-
ment of said employee from the service of his said
employer.

For a further, separate and distinct defense, de-
fendant alleges:

4. That in and by said bond or obligation it is,
among other things, provided that this defendant
was not to be liable by virtue of said bond or obli-

52 gation for any mere error of judgment or injudicious exercise of discretion on the part of the said employee, in and about all or any matters wherein he shall have been vested with discretion, either by instructions or the rules and regulations of the said employer; that said George N. O'Brien faithfully and in all respects honestly performed the duties of his office, and that if the said employer suffered any loss by reason of any act of the said George N. O'Brien, then such loss arose by reason of a mere error of judgment or injudicious exercise of discretion on the part of said George N. O'Brien, in and about matters wherein he was vested with discretion, either by instructions or the rules and regulations of his
53 said employer.

And, further answering, for a further, separate and distinct defense, the defendant alleges:

5. That in and by said bond or obligation it is, among other things, provided that this defendant shall in no way be held liable therein to make good any loss which may accrue to said employer by reason of any act or thing done or left undone by said employee in obedience to or in pursuance of any direction or instruction or authorization conveyed to or received by said employee from his said employer, or its duly authorized officer in their behalf, as by reference to said bond or obligation will more full appear; that if the said California National
54 Bank suffered any loss by reason of any act of the said George N. O'Brien, employee, then such loss arose or accrued by reason of acts or things done or left undone by him, said employee, in obedience to or in pursuance of directions, instructions or authorizations conveyed to and received by him from his said employer or its duly authorized officer in their behalf.

For a further, separate and distinct defense, this defendant alleges:

6. That in and by said bond or obligation it is, 55
among other things, provided that this defendant shall be notified, in writing, at its office in the City of New York, of any act on the part of the employee which may involve a loss for which the company is responsible thereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer, and this defendant alleges, upon information and belief, that the plaintiff did not notify this defendant in writing at its office in the City of New York of the acts therein alleged to have caused the losses in said complaint alleged to have been by said bank suffered as soon as practicable after the occurrence thereof came to the knowledge of the plaintiff. 56

And for a further, separate and distinct defense, this defendant alleges:

7. That in and by said bond or obligation it is, among other things, provided that any claim made in respect thereto should be in writing addressed to the company at its office in the City of New York as soon as practicable after the discovery of any loss for which the company is responsible hereunder, and within six months after the expiration or cancellation of the said bond, and this defendant alleges that this plaintiff did not give notice in writing to the defendant at its office in the City of New York of any claim in respect to the said bond as soon as practicable after the discovery of the losses alleged to have been by said bank suffered, or within six months after the expiration or cancellation of the said bond. 57

For a further, separate and distinct defense defendant alleges, upon information and belief:

8. That from the organization of the California National Bank of San Diego, at some time in the year 1888, down to the time when the said bank procured from this defendant the bond mentioned in and attached to the complaint herein, the said

- 58 George N. O'Brien had frequently engaged in transactions and performed acts, in the course of his employment by and in connection with the bank, which were in all respects identical in character with those which are now by the complaint herein charged to be fraudulent and dishonest. That said transactions and acts were not done secretly, nor did the said O'Brien make any attempt to conceal them. That the same were entered in the books of the bank as they occurred, and if they were not actually known to the officers of the bank and to its directors it was because said officers and directors were wholly unmindful and neglectful of their duties as such officers and directors, and wholly failed to take
- 59 any steps or make any effort to discharge the same. That, had they taken the slightest care in the premises, the acts of said O'Brien would have become known to them, and it would thereupon have become impossible for the bank to have sustained, through the alleged subsequent acts of the said O'Brien, the loss alleged in the complaint or any loss whatever.

9. And for a further and separate defense, this defendant avers, upon information and belief, that from the organization of the California National Bank of San Diego, at some time in the year 1888, down to the time when the said bank procured from
- 60 this defendant the bond mentioned in and attached to the complaint herein the said George N. O'Brien had frequently engaged in transactions and performed acts, in the course of his employment by and in connection with the bank, which were in all respects identical in character with those which are now by the complaint herein charged to be fraudulent and dishonest. That such transactions and acts were well known to the said California National Bank of San Diego, its directors and officers, including the officers who acted for said bank in procuring said bond for this defendant, and that at the time of procuring the bond aforesaid, this defendant was not informed of

them, but the same were concealed from it, and it issued said bond in entire ignorance thereof. And this defendant, therefore, avers that it was induced to execute and deliver said bond by a fraudulent suppression and concealment of material facts, and that the said bond is thereby rendered fraudulent and void. 61

And for a further, separate and distinct defense, this defendant alleges, upon its information and belief:

10. That prior to the issuance and execution of the bond in said complaint referred to, application was made to this defendant for the execution and issuance thereof; that at or about the time of said application, and prior to the issuance and execution of such bond, said California National Bank of San Diego, California, represented to this defendant that said George N. O'Brien had been in the employ of said bank for upwards of three years, and had always performed his duties in a faithful and satisfactory manner, to the best of the knowledge of said bank; that his accounts with said bank had been last examined on the 28th day of March, 1891, and found correct in every respect. That thereupon and in reliance upon the statements and representations of the said bank in that behalf, this defendant accepted the application for such bond and thereafter executed and delivered the same to said California National Bank of San Diego. That the accounts of said O'Brien were kept and his manner of performing his duties and his course of business as such cashier were similar in character subsequent to the time of the issuance by this defendant of said bond as the same were prior thereto; that if any of the acts or transactions of said O'Brien subsequent to the issuance of said bond were illegal or dishonest or fraudulent in any respect, then the representations of said California National Bank of San Diego in that behalf were false, and by it so known to be at the time of the making thereof, and were made with intent 62 63

64 to deceive this defendant and obtain from it the bond
in said complaint set forth.

Wherefore, the defendant prays that the complaint
of the plaintiff herein may be dismissed upon the
merits, with costs.

HENRY C. WILLCOX,
Attorney for Defendant,
160 Broadway,
New York City,
N. Y.

STATE OF NEW YORK, }
City and County of New York, } ss.:
65 Southern District of New York, }

HENRY D. LYMAN, being duly sworn, says: That
he is the vice-president of the American
Surety Company of New York, the defendant in
the above entitled action; that he has read the fore-
going answer and knows the contents thereof, and
that the same is true of his own knowledge, except
as to the matters therein stated to be alleged on in-
formation and belief, and as to those matters he be-
lieves it to be true.

Deponent further says that the reason this verifi-
cation is made by him is that the defendant is a do-
mestic corporation, of which he is an officer, to wit,
66 vice-president.

HENRY D. LYMAN.

Sworn to before me this 27th }
day of October, 1893. }

FRANKLYN PADDOCK,
[SEAL.] Notary Public (No. 63),
New York County.

Gentlemen:

Please to take notice of the defendant's amended
answer to the plaintiff's complaint in the within en-
titled action, served in pursuance of the order
granted by Mr. Justice Lacombe therein, duly filed

in the office of the Clerk of the United States Circuit Court for the Southern District of New York. 67

Dated October 26, 1893.

Yours, &c.,

HENRY C. WILLCOX,
Defendant's Attorney,
160 Broadway,
New York City,
N. Y.

To Messrs. MITCHELL & MITCHELL,
45 and 47 Wall Street,
New York City, N. Y.

(Endorsed)—Action No. 1.—United States Circuit Court, Southern District of New York.—Frederick N. Pauly, as Receiver, etc., Plaintiff, against American Surety Company of New York.—Amended Answer.—Henry C. Willcox, Defendant's Attorney, 160 Broadway, New York City, N. Y.—Service of a copy of the within amended answer is hereby admitted.—Dated New York, Oct 27, 1893.—Mitchell & Mitchell, Plff.'s Attys.—U. S. Circuit Court.—Filed Dec. 31, 1894.—John A. Shields, Clerk. 68

70

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California,

Plaintiff,

AGAINST

71 AMERICAN SURETY COMPANY OF
NEW YORK,
Defendant.

Action No. 1.
(O'Brien,
Cashier.)

Sir,—Please take notice that the annexed is a bill of the particulars requested in your notice of June 14, 1893, of the plaintiff's claim, for which this action is brought.

Dated July 21, 1893.

Yours, &c.,

MITCHELL & MITCHELL,

Attorneys for Plaintiff,

72

45 and 47 Wall Street,

N. Y. City.

To HENRY C. WILLCOX, Esq.,

Attorney for Defendant.

UNITED STATES CIRCUIT COURT

73

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California,

Plaintiff,

AGAINST

AMERICAN SURETY COMPANY OF
NEW YORK,
Defendant.

Action No. 1.
(O'Brien,
Cashier.)

74

BILL OF PARTICULARS.

1. The following are the dates when and the manner in which George N. O'Brien wrongfully and fraudulently misappropriated and aided in the wrongful and fraudulent misappropriation of moneys, securities and other personal property belonging to said bank, with the amounts of such moneys, and a description of such securities and other personal property as alleged in paragraph "6" of plaintiff's complaint:

75

On or about September 22, 1891, the said George N. O'Brien, as cashier, fraudulently, and for the purpose of defrauding said bank, issued and delivered to J. W. Collins, the president of the California National Bank, two certain certificates of deposit numbered 6800 and 6801 respectively, the first for \$7,500, and the second for \$8,500; said certificates certifying in effect that said Collins had on deposit in said bank the sums in said certificates mentioned, when in truth and in fact the said Collins had no sum on deposit in said bank, and the said bank was

- 76 not indebted to him in any sum; which fact the said George N. O'Brien well knowing, delivered said certificates to said Collins, and the same were afterwards loaned and negotiated by said Collins and the money obtained thereon appropriated by said Collins to his own use.

- On or about the 31st day of October, 1891, the said George N. O'Brien, as such cashier, then being in charge of the books of said bank, and having authority as such cashier to make the entries hereinafter stated, did on said day on the deposit tags of said bank enter two credits to J. W. Collins, each for \$10,000, and caused the same to be entered by a bookkeeper in the books of said bank to the credit
- 77 of the said J. W. Collins, without said Collins paying any consideration therefor to said bank, and without being entitled to said credits; that before the said date the said George N. O'Brien as cashier had suffered and permitted the said Collins to largely overdraw his account to a greater amount than the said sum of \$20,000. That soon after and about the said date the said George N. O'Brien suffered and permitted the said Collins to check out of said bank and apply to his own use the whole sum of \$20,000 so wrongfully and erroneously credited to him as aforesaid by said O'Brien.

2. The following is the amount of the pecuniary loss by said bank sustained of moneys, securities or other personal property in the possession of
- 78 said O'Brien or for the possession of which he was responsible, with a description of such securities or other personal property as alleged in paragraph "6" of said complaint:

The sum of thirty-six thousand dollars, consisting of two securities described as certificates of deposit in paragraph 1, numbered 6800 and 6801, for the sums of \$7,500 and \$8,500 respectively, signed by said George N. O'Brien and delivered to said Collins as set forth in paragraph 1, and moneys to the amount of \$20,000 of the California National, drawn

by and appropriated to his own use by the said J. W. Collins. 79

3. The following are the acts of fraud and dishonesty on the part of said O'Brien in connection with the duties of his office or position, with the dates thereof, alleged in paragraph "6" of said complaint:

On or about September 22, 1891, the said George N. O'Brien, as cashier, fraudulently and for the purpose of defrauding said bank, issued and delivered to J. W. Collins, the President of the California National Bank, two certain certificates of deposit numbered 6800 and 6801 respectively, the first for \$7,500 and the second for \$8,500; said certificates certifying in effect that said Collins had on deposit in said bank the sums in said certificates mentioned, when in truth and in fact the said Collins had no sum on deposit in said bank, and the said bank was not indebted to him in any sum, which fact the said George N. O'Brien well knowing, delivered said certificates to said Collins, and the same were afterwards loaned and negotiated by said Collins and the money obtained thereon appropriated by said Collins to his own use. 80

On or about the 31st day of October, 1891, the said George N. O'Brien, as such cashier, then being in charge of the books of said bank and having authority as such cashier to make the entries hereinafter stated, did on said day on the deposit tags of said bank enter two credits to J. W. Collins, each for \$10,000, and caused the same to be entered by a bookkeeper in the books of said bank to the credit of J. W. Collins, without said Collins paying any consideration therefor to said bank and without being entitled to said credits; that before the said date the said George N. O'Brien, as cashier, had suffered and permitted the said Collins to largely overdraw his account to a greater amount than the said sum of \$20,000. That soon after and about the said date the said George N. O'Brien suffered and 81

82 permitted the said Collins to check out of said bank and apply to his own use the whole sum of \$20,000 so wrongfully and erroneously credited to him as aforesaid by said O'Brien.

4. The following are the dates when, and the manner in which the said George N. O'Brien, while employed as cashier of said bank, embezzled, abstracted and willfully misapplied moneys, funds or credits of said bank, and without authority of the directors of said bank, issued and put forth certain certificates of deposit and put in circulation notes of said bank, and made false entries in the books of said bank, with intent to injure and
83 defraud said bank, with the amounts of moneys or funds thus embezzled, abstracted or willfully misapplied, and a statement of such credits and the amounts thereof, and the dates and amounts and a description of the notes and of such certificates of deposit, and the false entries thus made in the books of said bank, and the amount of the loss by said bank suffered as alleged in paragraph "7" of said complaint:

On or about September 22, 1891, the said George N. O'Brien, as cashier, fraudulently and for the purpose of defrauding said bank, issued and delivered to J. W. Collins, the President of the California National Bank, two certain certificates of
84 deposit numbered 6800 and 6801 respectively, the first for \$7,500 and the second for \$8,500; said certificates certifying in effect, that said Collins had on deposit in said bank the sums in said certificates mentioned, when in truth and in fact the said Collins had no sum on deposit in said bank, and the said bank was not indebted to him in any sum; which fact the said George N. O'Brien well knowing, delivered said certificates to said Collins, and the same were afterwards loaned and negotiated by said Collins and the money obtained thereon appropriated by said Collins to his own use.

On or about the 31st day of October, 1891, the said George N. O'Brien, as such cashier, then being in charge of the books of said bank, and having authority as such cashier to make the entries hereinafter stated, did on said day on the deposit tags of said bank enter two credits to J. W. Collins, each for \$10,000, and caused the same to be entered by a bookkeeper in the books of said bank to the credit of J. W. Collins, without said Collins paying any consideration therefor to said bank, and without being entitled to said credits; that before the said date the said George N. O'Brien as cashier had suffered and permitted the said Collins to largely overdraw his account to a greater amount than the said sum of \$20,000. That soon after and about the said date the said George N. O'Brien suffered and permitted the said Collins to check out of said bank and apply to his own use the whole sum of \$20,000 so wrongfully and erroneously credited to him as aforesaid by said O'Brien. 85

That on or about the 13th and 14th days of October, 1891, the said George N. O'Brien as such cashier, having charge and supervision of the books of said bank, made entries upon the deposit tags of said bank, and caused the same to be entered by a bookkeeper in the books of the bank, of credits in favor of J. W. Collins for the sum of \$45,000 without the said credits being due the said Collins, and without the said Collins paying any consideration therefor to said bank, and without his being entitled to such credits in any manner whatever, as he, the said George N. O'Brien, well knew, and that said Collins at that time had largely overdrawn his account as said O'Brien knew, and was allowed soon thereafter to draw from the funds of said bank more than the amount of \$45,000 and appropriated the money to Collins' own use. 87

That the amount of the loss suffered by said bank as alleged in paragraph 72 of said complaint is the sum of \$81,000.

88 5. The following are the dates when and the manner in which the said George N. O'Brien aided and abetted the president of said bank, one John W. Collins, in embezzling, abstracting and willfully misapplying the funds and credits of said bank, giving the amounts of moneys and funds and a statement of the credits thus embezzled, abstracted and willfully misapplied, the dates when and the manner in which the said George N. O'Brien aided and abetted the said Collins in putting forth certain certificates of deposit with a statement of the dates and amounts of such certificates of deposit and a description thereof, and to whom issued, the dates when and the manner in which the said O'Brien aided and abetted
 89 said Collins in issuing and putting into circulation notes of said bank, with the amounts and dates of such notes and a description thereof, and to whom issued; the dates when and the manner in which the said O'Brien aided and abetted said Collins in making false entries in the books of said bank with intent to injure and defraud said bank, with the dates of such entries and the substance thereof, and the amounts in which said bank suffered pecuniary loss as alleged in the "8" paragraph of plaintiff's complaint:

90 On or about September 22, 1891, the said George N. O'Brien, as cashier, fraudulently and for the purpose of defrauding said bank, issued and delivered to said J. W. Collins, the president of the California National Bank, two certain certificates of deposit numbered 6800 and 6801 respectively, the first for \$7,500 and the second for \$8,500; said certificates certifying in effect that said Collins had on deposit in said bank the sums in said certificates mentioned, when in truth and in fact the said Collins had no sum on deposit in said bank, and the said bank was not indebted to him in any sum; which fact the said George N. O'Brien well knowing, delivered said certificates to said Collins, and the same were afterwards loaned and negotiated by

said Collins and the money obtained thereon, appropriated by said Collins to his own use. 91

On or about the 31st day of October, 1891, the said George N. O'Brien, as such cashier, then being in charge of the books of the bank and having authority as such cashier to make the entries hereinafter stated, did on said day on the deposit tags of said bank enter two credits to J. W. Collins, each for \$10,000, and caused the same to be entered by a bookkeeper in the books of said bank to the credit of J. W. Collins, without said Collins paying any consideration therefor to said bank, and without being entitled to said credits; that before the said date the said George N. O'Brien suffered and permitted the said Collins to largely overdraw his account to a greater amount than the said sum of \$20,000. That soon after and about the said date the said George N. O'Brien suffered and permitted the said Collins to check out of said bank and apply to his own use the whole sum of \$20,000 so wrongfully and erroneously credited to him as aforesaid by said O'Brien. 92

That on or about the 13th and 14th days of October, 1891, the said George N. O'Brien, as such cashier, having charge and supervision of the books of said bank, made entries upon the deposit tags of said bank and caused the same to be entered by a bookkeeper in the books of said bank, of credits in favor of J. W. Collins for the sum of \$45,000, without the said credits being due the said Collins, and without the said Collins paying any consideration therefor to said bank and without his being entitled to such credits in any manner whatever, as he, the said George N. O'Brien, well knew, and that said Collins at that time had largely overdrawn his account as said O'Brien knew, and was allowed soon thereafter to draw from the funds of said bank more than the amount of \$45,000 and appropriated the money to said Collins' own use. 93

That the amount of loss suffered by said bank as alleged in paragraph 8 of said complaint is \$81,000.

- 94 6. The following is the date of the dismissal or retirement of said George N. O'Brien, and of the discovery of the acts of fraud or dishonesty referred to as alleged in the "9" paragraph of said complaint.

The said George N. O'Brien ceased to act as the cashier of the said California National Bank upon the same going into insolvency and coming into the possession of the Comptroller of the Currency of the United States, which took place November 12, 1891. That on the 29th day of December, 1891, Frederick N. Pauly, the plaintiff herein, qualified as the Receiver of said bank, and took full possession of its assets under
95 his trust, and that the acts of fraud and dishonesty referred to in paragraph 9 of said complaint were discovered during the months of February and March, 1892.

Dated July 21, 1893.

Yours, &c.,

MITCHELL & MITCHELL,
Attorneys for Plaintiff,
45 and 47 Wall Street,
N. Y. City.

UNITED STATES OF AMERICA, {
State of California, { ss.:
District of California, }

- 96 FREDERICK N. PAULY, being duly sworn, says: That he is the plaintiff in the above entitled action; that he believes the foregoing is a true and correct bill of particulars of the demand for which this action is brought.

(Sgd.) FREDERICK N. PAULY.

Sworn to before me this 21st }
day of July, 1893. }

(Sgd.) F. P. BRUNER,
[SEAL.] Notary Public in and for San
Diego Co.,
Calif.

(Endorsed)—U. S. Circuit Court, Southern Dist. of New York.—Frederick N. Pauly, as Receiver, &c., Plaintiff, against American Surety Company of New York, Defendant (Action No. 1).—Notice and Bill of Particulars.—Mitchell & Mitchell, Attorneys for Plaintiff, 45 and 47 Wall Street, New York City.—Personal service of within is hereby admitted, dated San Diego, July 21, 1893.—Henry C. Willcox, Attorney for Defendant.—U. S. Circuit Court.—Filed Dec. 31, 1894.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

98

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California,

Plaintiff,

AGAINST

AMERICAN SURETY COMPANY OF NEW YORK,
Defendant.

Action No. 1,
O'Brien, Cashier.
Defendant's Bill
of Particulars.

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The statements and representations made to defendant on behalf of the California National Bank of San Diego, California, at or about the time of, and upon the application to defendant for the bond in the 10th paragraph of defendant's amended answer referred to, were by said George N. O'Brien; that application was made for a bond of indemnity, to date from July 1, 1892, for \$15,000 in favor of the California National Bank of San Diego, California,

- 100 as security to it, covering the said O'Brien's position in its service as cashier; that San Diego was a post-office; that the full name of the said applicant was George Norton O'Brien, 24 years of age, who was born at Kewanee, Henry County, Illinois, on October 19, 1867, and resided at his native place about fifteen years; that he was unmarried, and those dependent upon him for support were his father, James O'Brien; his sister, M. Carrie O'Brien; that he had been engaged with his present employers three years and a couple of months, and about six months in the position which he then occupied; that the nature of the business of the employer was banking, located at San Diego, California; that the duties
- 101 required of the said O'Brien were bank correspondent and supervision of the several departments, and the salary he was then receiving was eighteen hundred dollars per annum, or thereabouts; that no other allowances were made to him, and the same was subject to no deduction; that he had no income worth mentioning, other than the salary above named; that he was engaged in no other business or employment; that he was not engaged and did not from time to time engage in purely speculative transactions, such as stock, grain, oil, or real estate; that he had never been bankrupt or insolvent, and that he had never compounded with his creditors; that he had never been in arrears or default in his
- 102 present or previous employment; that his accounts were last examined by the National Bank Examiner and found correct; that he had never been discharged from any situation, or other engagement; that he was on a few small bonds and was security on one or two notes of no consequence; that he owed about two thousand dollars on his home, and had no other debts; that he had given no other security than the bond now required, and was not then required to do so; that he did not then furnish any other security than that applied for; that he had applied to no other source for a bond; that his occupation immediately preceding his present position was

real estate business, and he discontinued that to better his condition; that during the past ten years the names of his employers and the dates of his employment were as follows: In the years 1884 and 1885 he was employed as bookkeeper for the O'Brien Brothers Manufacturing Company, at Tiffin, Ohio, of which James O'Brien was President; that from the year 1885 to 1887 he was employed as bookkeeper and stenographer for the Baltimore and Ohio Railroad Company at Tiffin, Ohio, under E. M. Davis, D. F. A.; during the years 1887 and 1888 he was employed as bookkeeper and stenographer for W. H. Holabird & Company at San Diego, California, under W. H. Holabird. That he was a graduate of the University of Notre Dame, Indiana, having graduated in the summer of 1884, and had been in active business only seven years; that his reason for leaving former employers was his wish to go West; that his life was insured for \$5,000 in the Equitable for twenty years from 1888; in the Michigan Mutual at Detroit for \$2,500 for forty years from 1887; \$5,000 in the United States Mutual Accident Company, one year; \$1,000 in the C. K. A. Chattanooga Life; that his father was James O'Brien; his address, San Diego, California; that he had retired from business on account of old age; that his mother was not living; that his nearest male relative on his father's side was Thomas O'Brien; address, Morico, Illinois, and his nearest male relative on his mother's side, Myles Seery; address, Princeville, Illinois. That the said George N. O'Brien referred to the following persons:

NAME.	OCCUPATION.	ADDRESS.
Elias Lyman.....	Banker	Kewanee, Illinois.
Thomas A. Noonan ..	Gen'l Mgr Big Four R. R. Co.	Chicago, Ill., 12 Pacific Avenue.
John Ellis	Banker	Kewanee, Illinois.
E. M. Davis.....	D. F. A. B. & O	Tiffin, Ohio.
L. W. Frary.....	Retired	Pasadena, Cali- fornia.

- 106 That thereupon it was at the same time stated, represented and certified by the California National Bank, acting by its president, John W. Collins, that he, the said Collins, had read the foregoing declaration and answers made by said George N. O'Brien and believed them to be true; that he, said George N. O'Brien had been in the employ of the said bank during three years, and to the best of the knowledge of the said Collins had always performed his duties in a faithful and satisfactory manner; that his accounts were last examined on the 28th day of March, 1891, and found correct in every respect; that he was not at that time, to the knowledge of the said Collins, in arrears or in default; that he, the said Collins, knew
- 107 nothing of his habits or antecedents affecting his title to general confidence, or any reason why the bond applied for should not be granted; that the amount of the bond required was \$15,000, to date from July 1, 1891; that at the same time representation was made by John W. Collins, President of the California National Bank, that application was made for a bond of indemnity, to date from July 1, 1891, for \$25,000 in favor of the California National Bank of San Diego, California, as security to the said bank covering the said Collins' position in its service as president at San Diego, California; that the said City of San Diego is a post office; that the full name of the applicant was John William Collins;
- 108 that he was forty two years of age; that he was born at Shrewsbury, York County, Pennsylvania, in 1848, and resided at his native place about twenty years; that he was a widower, his entire family consisting of a wife and two children, having been drowned September 1, 1890; that no one was dependent on him for support; that he had been in the employ of the said bank three and one-half years as cashier or president; that the nature of the business was banking, located at San Diego, California; that the duties required of him in his position were the handling of money, occasionally, part of the correspondence of the bank, and such as any bank

might require of its president; that the salary he was receiving was \$3,000, from July 1, 1891; that no other allowances were made to him and his salary was subject to no deduction; that his income from other sources other than his salary aggregated, say, about \$15,000 or \$20,000, as stockholder in several banks; that during his employment as president of said bank, he was engaged with one Henry E. Brunell as his partner in business, keeping a dry goods store at Helena, Montana, the firm name being Brunell & Company; that he sometimes bought real estate; that he never touched anything through the Stock Exchange, such as stocks, grain, or oil, except local or bank stocks, &c.; that he had never been bankrupt or insolvent, nor compromised with his creditors or other scrapes of the kind; that he had never been in arrears or default in the position which he then held, or any previous position; that his accounts were last examined by the National Bank Examiner, usually once a year, and were found correct; that he had never been discharged from any situation or other engagement; that he was bondsman for several parties as notaries public, and others, such as in his banking business he found advantageous; that he sometimes owed considerable, but did not care to name amounts, and that he owned \$300,000 worth of property and never gave a mortgage, when he required money he borrowed it, but usually had a good balance in the bank; that as administrator he had repeatedly had bondsmen, but all were discharged at that time, except one, as nearly as he could remember; that he furnished no security other than that now applied for; that he had applied to no other source for a bond and was not required so to do; that he formerly lived at Cheyenne, and was at that time president of the Cheyenne National Bank and the heaviest shareholder; that during the entire ten years previous to the application then made, he had been connected with the California National Bank and Cheyenne National Bank either

- 112 as cashier or president, and at that time was president of both and the largest shareholder in both; he referred to the cashiers of the said banks, G. L. Beard, of Cheyenne, Wyoming, or George N. O'Brien, of San Diego, California, or William Collier, of San Diego, California. That his life was insured in amounts aggregating, say \$100,000, in the Equitable and New York Mutual, about \$50,000 each; that his father's name was Cornelius Collins, a farmer; address, Shrewsbury, Pennsylvania; that his mother had died many years before; that his next male relative on his father's side was James W. Collins; address, Peach Bottom, York County, Pennsylvania; that his next male relative on his
- 113 mother's side was A. G. Collins, Hebron, Nebraska; that he referred to the following persons:

	NAME.	OCCUPATION.	ADDRESS.
	James Gerry, M. D.	Physician.....	Shrewsbury, Pa.
	E. H. Murray	Land Owner	
		and Editor.....	San Diego, Cal.
	A. G. McLeod.....	Contractor, carpentering, &c.	Denver, Colo.
	E. S. N. Morgan....	Attorney at Law	Cheyenne, Wyoming.
	M. M. Hanuna ...	Bank Clerk....	Denver, Colo.
	W. R. Stebbins....	Banker and land owner	C/o Chrystie & Janney, 6 Wall St., N Y. City.
114	William Collier		San Diego, Cal.

That at the time representation was made by William Collier, one of the directors of the California National Bank of San Diego, California, that John W. Collins was not related to him; that he had known the said Collins for about three and one-half years; that he considered him sober, careful and reliable; that the said Collins lived within his means and was qualified to be intrusted with the custody of

money; that he had been associated with the said 115
Collins in business, occupying the position of presi-
dent of the bank of which Collins was cashier, and
so had opportunities of forming a judgment of his
integrity and general character, and that the said
Collins had never, to his knowledge, been suspected
of fraud or dishonesty, and that the said Collins had
never, to his knowledge, been suspected of dis-
honesty or improper conduct, or been addicted to
gambling; and that he had never known of said
Collins speculating in stocks, or otherwise; that he
desired to say that he was not in active practice as
a lawyer, but was engaged in looking after his own
property interests, and further, that he was a director
of the said California National Bank, of which said 116
Collins was president; that he knew of no individual
debts of said Collins; that the name of said Collins
was on two official bonds for a limited sum;
that the said Collins had never been bankrupt, in-
solvent or in pecuniary difficulties, that he knew
of; that during the time he had been acquainted
with said Collins, said Collins had been cashier and
president of the California National Bank of San
Diego, California; that he knew said Collins to be
interested in other banks as stockholder; that said
Collins gave his personal attention to the California
National Bank of San Diego, California; that said
Collins had not, to his knowledge, been dismissed 117
from any situation; that his knowledge of the ap-
plicant's character was based on acquaintance with
him for the three and one-half years, then last past,
and by reports of said Collins from former acquaint-
ances before his personal knowledge of the said
Collins began.

Dated December 27, 1893.

HENRY C. WILLCOX,
Attorney for Defendant,
160 Broadway,
New York City,
New York.

118 STATE OF NEW YORK,
 City and County of New York, } ss.:
 Southern District of New York, }

HENRY D. LYMAN, being duly sworn, says: That he is Vice-president of the American Surety Company of New York, the defendant in this action; that he has read the foregoing bill of particulars, and that he believes the same to be true. That the reason this verification is made by deponent is that the defendant is a domestic corporation of which he is an officer, to wit: vice-president.

HENRY D. LYMAN.

Sworn to before me this 27th }
 day of December, 1893. }

119 J. W. MASON,
 [L. s.] Notary Public,
 N. Y. Co.

(Endorsed)—Action No. 1.—United States Circuit Court, for the Southern District of New York.—Frederick N. Pauly, as Receiver, &c., Plaintiff, against American Surety Company of New York, Defendant.—Defendant's Bill of Particulars.—Henry C. Willcox, Defendant's Attorney, 160 Broadway, New York City.—Service of a copy of within bill of particulars is admitted.—Dated N. Y., Dec. 27, 1893.—Mitchell & Mitchell, Plff.'s Attys.—U. S. Circuit Court.—Filed Dec. 31, 1894.—John A. Shields, Clerk.

At a Stated Term of the Circuit Court of 121
 the United States of America, for the
 Southern District of New York, in the
 Second Circuit, held at the United
 States Court Rooms in the City of New
 York, on Monday, the 15th day of Oc-
 tober, in the year of our Lord one
 thousand eight hundred and ninety-
 four.

Present—The Honorable WM. J. WALLACE,
Circuit Judge.

FREDERICK N. PAULY, Re-
 ceiver,

vs.

AMERICAN SURETY CO. OF NEW
 YORK.

No. 1.

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Now comes the plaintiff, by William Mitchell,
 Esq., his attorney, and moves the trial of this
 cause.

Likewise comes the defendant, by George A.
 Strong, Esq., its attorney.

Thereupon a jury is empanelled and the cause pro-
 ceeds to trial.

Afterwards and on the 19th day of October, 1894, 123
 after hearing the evidence of the respective parties,
 the argument of counsel and the instructions of the
 Court, the jury retire and on their return say that
 they find a verdict for the plaintiff for the full
 amount, with interest, making sixteen thousand
 eight hundred and forty-seven dollars and fifty
 cents (\$16,847.50), and so say they all.

Stay of sixty days is granted to make and serve a
 case.

(An extract from the minutes.)

[SEAL.]

JOHN A. SHIELDS,
 Clerk.

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At a Stated Term of the United States Circuit Court, for the Southern District of New York, held at the United States Circuit Court, in the Post Office Building, in the City of New York, on the 9th day of November, 1894.

Present—Hon. WILLIAM J. WALLACE,
Circuit Judge.

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FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California,

Plaintiff,

AGAINST

AMERICAN SURETY COMPANY OF
NEW YORK,
Defendant.

Action No. 1.
O'Brien, Cashier.

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A verdict having been rendered in the above entitled action in favor of the plaintiff and against the defendant, and the defendant having thereupon moved for a new trial upon the exceptions, and on the grounds that such verdict is contrary to law and to the evidence, and such motion having been heard, and counsel for plaintiff and for defendant having handed in briefs on said motion, and due deliberation having been had thereon, it is

Ordered, that such motion be and it hereby is in all things denied.

WM. J. WALLACE,
U. S. Circuit Judge.

(Endorsed)—U. S. Circuit Court, Southern Dist. of New York.—Frederick N. Pauly, as Receiver, &c., Plaintiff, against American Surety Company of New York, Defendant.—Action No. 1. —Order Denying Motion for a New Trial.—Mitchell & Mitchell, Attorneys for Plaintiff, 44 & 46 Wall Street, New York City.—U. S. Circuit Court.—Filed Nov. 9, 1894.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

128

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego,
Plaintiff,

AGAINST

AMERICAN SURETY COMPANY
OF NEW YORK,
Defendant.

Action No 1.

The issues in this action having been brought on for trial before Hon. William J. Wallace, United States Circuit Judge, and a jury, at a Stated Term of this Court, held in and for the Southern District of New York, in the Second Circuit, at the United States Court Rooms in the City of New York, on the 15th day of October, 1894, and said trial having been continued on the 16th, 17th, 18th and 19th days of October, 1894, and the plaintiff herein appearing by Mitchell & Mitchell, his attorneys, and William Mitchell and Edward W. Paige, of counsel, and the defendant herein appearing by Henry C. Willcox, its attorney, and George A. Strong, of counsel, and

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130 the issues having been tried, and the jury after hearing the evidence of the respective parties, the argument of counsel and the instructions of the Court, having on the 19th day of October, 1894, rendered a verdict for the plaintiff for the sum of sixteen thousand eight hundred and forty-seven dollars and fifty cents (\$16,847.50), and the costs of the plaintiff having been duly adjusted at three hundred and eighty-five and $\frac{73}{100}$ dollars, and the interest on said verdict to date having been adjusted at two hundred and two and $\frac{16}{100}$ dollars; now, on motion of Mitchell & Mitchell, attorneys for plaintiff, it is

131 Adjudged, that the said plaintiff do recover of the said defendant the sum of sixteen thousand eight hundred and forty-seven dollars and fifty cents (\$16,847.50), found by the jury, and three hundred and eighty-five $\frac{73}{100}$ dollars costs, and two hundred and two $\frac{16}{100}$ dollars interest on verdict, amounting in all to seventeen thousand four hundred and thirty-five $\frac{39}{100}$ dollars (\$17,435.39), and that said plaintiff have execution therefor.

Dated December 31, 1894.

(Sgd.) GILBERT E. ROGERS,
Deputy Clerk.

132 (Endorsed)—U. S. Circuit Court, Southern Dist. of N. Y.—Frederick N. Pauly, as Receiver, &c., Plaintiff, against American Surety Company of New York, Defendant.—(Action No. 1.)—Judgment.—Mitchell & Mitchell, Attorneys for Plaintiff, 44 & 46 Wall Street, New York City.—U. S. Circuit Court.—Filed Dec. 31, 1894.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT,

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SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Re-
ceiver of the California Na-
tional Bank of San Diego,
California,

Plaintiff,

AGAINST

AMERICAN SURETY COMPANY OF
NEW YORK,
Defendant.

Defendant's Bill
of Exceptions.

Action No. 1.
(O'Brien,
Cashier).

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Be it remembered that afterwards, to wit, on the 15th, 16th, 17th, 18th and 19th days of October, 1894, at the Circuit Court of the United States for the Southern District of New York, held in the City of New York, in the said District, before Honorable William J. Wallace, Circuit Judge, the issues joined in the above stated cause came on to be tried by a jury for that purpose duly empanelled, in the presence of William Mitchell and E. W. Paige, of counsel for the plaintiff, and George A. Strong and Henry C. Willcox, of counsel for the defendant.

135

Counsel for defendant moves to dismiss the complaint upon the pleadings upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and that the proof of claim was not made as soon as practicable after the discovery of the loss, nor within six months after the expiration or cancellation of the bond.

Mr. Mitchell opens the case for the plaintiff.

By leave of the Court thereupon granted, defendant objecting thereto, plaintiff amends his complaint and bill of particulars by striking out

136 paragraphs ten and eleven of said complaint, and inserting in lieu thereof as follows:

On the 23d May, 1892, and on the 18th June, 1892, and on the 24th June, 1892, and on the 18th July, 1892, and as soon as practicable after the discovery of the wrongful acts of the said O'Brien, this plaintiff duly notified the defendant in writing at its office in the City of New York, and as soon as practicable after the discovery of said loss, presented to the defendant a claim in writing of and for the losses occasioned by such acts of said O'Brien. And the plaintiff has duly performed all the acts and things which it as employer in and by said bond was obligated to do; all of which notices and claim were received and accepted by the defendant as in all things sufficient and in time, and plaintiff thereupon duly demanded from the defendant that it make good and reimburse the plaintiff the sum of \$15,000 and interest towards and for the amount of pecuniary loss sustained by the said bank by reason of the said acts. And by striking out of said bill of particulars all of six after the first paragraph and inserting instead thereof: that the date of the dismissal or retirement was the second of March, 1892; that the acts of fraud and dishonesty referred to in paragraph nine of said complaint were discovered between 1st of May and 23d of May, 1892.

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And thereupon, to maintain the issues on plaintiff's part, plaintiff's counsel reads from the deposition of George N. O'Brien, taken at San Diego, California.

GEORGE N. O'BRIEN, being first duly sworn, testified as follows:

By Mr. Luce:

Q. State your name, age, occupation and place of residence? A. George N. O'Brien; age 27; I reside in San Diego; business, butcher.

Q. State where you resided and what your occupation was in the year 1891? 139

W. J. Hunsaker: Mr. Commissioner, I appear here on behalf of the witness George N. O'Brien, who in 1892 was indicted by the Grand Jury upon certain charges growing out of his connection with the affairs and the management of the affairs of the California National Bank, and I am satisfied from an examination of the cases that he is innocent of these charges, but there can be but one purpose in this question, which I understand is asked in the case wherein the Receiver of the California National Bank is plaintiff and the American Surety Company is defendant, the action being based upon the bond given by Mr. O'Brien, as cashier, and Mr. Collins, as president of that bank. The charges which are made against Mr. O'Brien in the indictment are covered by the charges which are made in the complaint and which form the basis of the breach of the bond. As counsel for Mr. O'Brien, I have advised him to decline to answer any questions showing or tending to show his connection with the affairs of the bank on the ground that they tend to criminate him and he is privileged from answering them. 140

Q. (Repeated by the reporter.) A. I will decline to answer on the ground that my answer might tend to incriminate me.

Q. State if you know in what capacity J. W. Collins was acting in connection with the California National Bank, if any during the year 1891? A. The same reply holds good; my former reply holds good in this connection; I decline to answer. 141

Q. Who was the cashier of the California National Bank during the year 1891? A. I will make the same answer.

Q. Were you acquainted in that year with one S. C. Gregg, during the year 1891? A. The same answer.

Q. Do you know where S. C. Gregg now is? A. Do you want my belief in the matter?

- 142 Mr. Willcox: He asks if you know. I ask the the commissioner to observe the form of the question. A. I don't know.

Q. Do you know anything about where he was during the years 1892 and 1893? A. He was here a portion of the time, I think.

Q. In the year 1892? A. That was the year following the failure of the bank?

Q. Yes? A. Yes; he spent some of his time in San Diego.

Defendant admits that this action was commenced (on said date) May 8, 1893.

- 143 CHARLES L. BRIMHALL, sworn as a witness for plaintiff, was questioned and answered as follows:

Questioned by Mr. Mitchell:

- In the year 1891 I was bookkeeper for the California bank of San Diego, and had been so employed for about three years. I kept the ledger account of that bank in the year 1891 as such bookkeeper, and kept the account of J. W. Collins with that bank. He was the president thereof and had been such since the first of January, 1891, I think. The book now shown me is the deposit ledger of the California National Bank of San Diego, and it contains the account of J. W. Collins with the bank. The cashier of the bank was George N. O'Brien, and I think he had been cashier from the first of January, 1891. The teller was S. C. Gregg.
- 144

(It is admitted by both parties that S. C. Gregg, of whom the witness speaks, died on or about the 30th of July, 1894.)

Mr. Gregg was both receiving and paying teller. I saw him transact his business as such. My desk was right back of his, so that I could see what transpired. When checks were paid they were stamped and put on a spindle usually or in a basket, and when money was received it was put

in a till with the other money. There were two 145
 spindles, one for receiving tags and the other for
 holding checks. If he received any money he put
 it on one side, with the accompanying tags, and on
 the other side he kept the checks that were received
 by him and paid. There was a stamp that was put
 on the checks paid. The teller put the stamp on.
 The account of Mr. Collins is on page 120 of the
 book just referred to. The account is made up of
 debits and credits. In the regular course of busi-
 ness the checks and deposits were handed in to the
 bookkeepers and they made the entries from the
 checks and deposits into this book. This account
 contains the correct account of the transactions of
 Mr. Collins with the bank. The entries were made 146
 by reason of checks of Collins that were handed to
 me, and the credits were obtained from the tags
 which I received, and they were entered at about
 the dates thereof for the amounts as stated.

Plaintiff's counsel offers the account referred
 to in evidence.

Objected to as incompetent, immaterial, ir-
 relevant and not sufficiently proved.

Objection overruled. Exception by defend-
 ant.

Q. Will you please look at the date of September
 21, 1891, and state what the apparent balance in
 that account is?

147

Same objection, ruling and exception.

Questioned by the Court:

I was not the only bookkeeper; Mr. Rogers kept
 with me on the deposit book. The ledger entries
 were sometimes made by Mr. Rogers and sometimes
 by myself—co-operating, at the same time.

Questioned by Mr. Strong:

I know nothing about the transactions them-
 selves; I made the entries from certain memoranda

148 handed to me. In the case of a credit to an account I would receive a deposit slip which stated that so much money had been deposited, but I did not know of my own personal knowledge whether so much money had or had not been deposited. In the same way, in regard to a charge, I would make it from checks which were handed to me, and I would not know of my own knowledge whether all of the checks had been paid or not. The stamp to which I have referred was usually affixed the same day the checks were paid and by the teller. In a few cases I affixed it, but as a rule I did not. I do not know of my own knowledge that the teller affixed the stamp. I only know that the checks
149 would be stamped before they came in to me, and they usually came in to me the same day.

Questioned by the Court:

The ledger account of each individual was posted each day.

Questioned by Mr. Strong:

I think that account is in the same condition it was when the bank went into the hands of the Comptroller of the Currency, except, I think, there are one or two postings after the bank closed. There were some entries made by the Receiver or by his instructions. I think that Mr. Rogers actually made
150 them. The account in this book is in the same condition in which it was before the Receiver took possession. No entries were made in this book. This book does not contain the whole account. There is some more in the other book. The account is continued in the other book, and those entries were made in the second book, ledger number 5; this is ledger number 4. The new entries, after the receivership, were all made in ledger 5.

Questioned by Mr. Mitchell:

They are the last two entries in the account.

Mr. Mitchell: I offer this book (ledger No. 5) 151
also in evidence as a continuation of the other.

Mr. Strong: We object to both of them on all the
grounds specified before, and to this one in particular,
on the ground of the additions that have been
made to the account.

The Court: That does not vitiate the book. Of
course there will have to be some explanation made
of those entries which were made out of the usual
course of business.

Mr. Mitchell: I offer to do that now.

Q. You may state what you know about those
entries that were made after the suspension of the
bank? A. I know that they are charged up here.

152

Defendant objects to the witness stating what
the entry is.

The Court: Let him state, because it will all come
out.

Objection overruled. Defendant excepts.

The Witness: One is a charge of \$350, on January
14, 1892.

By the Court:

Q. When was that regular ledger account closed?

A. On November 11th.

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By Mr. Mitchell:

Q. What was the seeming balance at that time?

Same objection, ruling and exception.

A. \$11,420.90 credit. There was an apparent
credit balance of that amount at that time.

Q. Do you find on the credit side of that account
on or about the 13th day of October a credit of \$24,-
500? Just read what you find.

Same objection, ruling and exception.

- 154 A. A credit of \$20,000 marked "Western National" and \$24,500 marked "U. S. National."

Defendant's counsel moves to strike out the answer on the ground that it does not appear that any claim was served upon the company in respect to these items.

Motion denied. Exception by defendant.

Plaintiff's counsel offers in evidence notice and proof of claim dated June 24, 1892, directed to the American Surety Company of New York.

Objected to. Objection overruled. Defendant excepts.

Marked Plaintiff's Exhibit "A."

- 155 Questioned by Mr. Mitchell:

I find two credits on Collins' account on the 13th and 14th of October, one of \$20,000 and one of \$24,500. One is marked in lead pencil "The Western National Bank is for \$20,000" and the other "The United States National Bank, \$24,500."

Q. What, if any, entry do you find credited to J. W. Collins under date of October 31, 1891?

Same objection, ruling and exception.

- 156 A. \$20,000. The full entry is "First Chicago," "Western New York." It does not say what amount is for the First Chicago. It is not divided; both are run in together. There are two items apparently, one from the First Chicago and the other from the Western New York, Western National. There are two items. They are entered as one amount, two different sources. It will show on the deposit tag.

Mr. Strong: I suppose all this witness can say is to read what entry there is there.

The Court: Yes.

There is no other credit entry on that date. There is one on the 14th of \$500.

Q. What is that on the 14th?

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Same objection, ruling and exception.

A. It states \$500, it does not give the source here (book handed witness). This book is the teller's book of the California National Bank (handing witness a paper). This deposit slip is in the handwriting of George N. O'Brien; that is the deposit tag I posted into the ledger.

Plaintiff's counsel offers in evidence the deposit slip referred to.

Objected to as incompetent, immaterial and irrelevant, on the ground that it is a mere statement or declaration of George N. O'Brien and therefore not evidence against his sureties.

158

The Court: This is an entry made in the usual course of business at the bank.

Mr. Strong: It does not appear when this tag was written.

The Court: I suppose they will elicit that fact from the witness. The only way you can prove bank accounts is in this way, and it is entirely competent, as showing the general course of business in the bank, for somebody who is personally cognizant of it and took part more or less in making the entries, to read the books of entry.

Questioned by Mr. Mitchell:

159

The paper just handed me is a deposit slip, dated October 14, 1891, to the credit of J. W. Collins, \$500. It is in the handwriting of George N. O'Brien.

Questioned by Mr. Strong:

I remember when the slip was made only from the looks of it. I have no special recollection of it. I am not sure that I saw Mr. O'Brien write it, and I only know when he wrote it by the date of the slip and the appearance of the paper.

160 Q. But you don't know of your own knowledge when he wrote it? A. About that time; that date

Q. I say, do you know of your own knowledge that he wrote it at that time—yes or no? A. No, any more than—

Q. That is enough.

Questioned by Mr. Mitchell:

I know I received that slip on the 14th, and then posted it into the ledger account on the day it bears date.

161 Questioned by Mr. Strong:

I know I did not make that entry from any other paper because I made it from this one. I made them all. I have no special recollection of this single paper. I could not have made the entry from any other deposit tag. I know that from the postings and marks that were made on the book—memorandums that I made on them. That entry might have been made from another tag of the amount mentioned; if it had been made, it might, the same as this. I know that a tag bearing all that writing on that book was before me, because we always pinned them together and kept them just as we have them when we post them.

162

Questioned by the Court:

Our practice was as follows: After making credit entries we pinned all the deposit tags together before we posted them and then posted direct from these into the ledger; fastened them together as you see them now, with a pin. All the slips for one day are pinned together. The bookkeeper takes them and makes the proper entries in the ledger. After that they are filed away in the vault of the bank. This slip came through the teller.

The Court: Well, you have got to show where it 163
came from. I will admit it subject to your making
sufficient proof to show its authenticity; but I think
you had better commence at the beginning and put
your Receiver on and show what books and papers
came into his hands and where they were.

Examination of the witness suspended for the
purpose of examining Mr. Pauly.

FREDERICK N. PAULY, sworn and examined as a
witness for the plaintiff:

Questioned by Mr. Mitchell:

I am the plaintiff in this action. The papers 164
which are now handed me are the deposit slips of
the California National Bank of San Diego. I re-
ceived them from the National Bank Examiner.
They were turned over to me with the other papers,
effects and assets of the California National Bank,
and at the same time these deposit tags (other
papers handed witness) were handed to me. I also
received the ledger and the teller's book. These
were five checks delivered to me by the National
Bank Examiner.

The five checks are marked for identification
Exhibits B, C, D, E and F.

The witness produces two notes, which are 165
marked for identification Exhibits G and H.

CROSS-EXAMINATION by Mr. Strong:

I received these papers from the Bank Examiner
on the 29th day of December, 1891. I saw them for
the first time a few days prior.

Questioned by Mr. Mitchell:

This bundle of deposit tags so far as I know is just
in the same condition as when I received it.

166 CHARLES L. BRIMHALL recalled:

Questioned by Mr. Mitchell:

I recognize this as a bundle of tags which I received on or about the day they bear date, in the regular course of my employment as a bookkeeper, and from which entries were made. This is the tag (indicating) from which I made the entry to the credit of Collins on October 13th.

Plaintiff's counsel offers the paper in evidence.

Questioned by Mr. Strong:

167 Q. Do you mean now to say anything different from what you said a moment ago, that you had no recollection at present of the particular paper that you had on that day, or do you still say that? A. Well, they were right in the same bundle. I remember these two more distinctly than this other one. I remember at the time I made the entry on the ledger of \$24,500 I had a tag, the notations upon which were the same as these. I mean by the notations, notations showing where they were from. I remember that. When I said a moment ago I had no personal recollection, I referred to this other one—this \$500 one. I had no recollection of that. I did not mean to say I had no personal recollection of the larger one. As to the larger one I remember
168 posting the amounts from that into the ledger on these dates. What struck me as peculiar about the transaction on that day was that the amounts were good-sized ones. There were a good many good-sized ones in that account.

The Witness: The slip is in Mr. O'Brien's handwriting and shows the source from which it comes; there are two ink memoranda; those (indicating) were made in there in ink.

Plaintiff's counsel offers the deposit slip referred to in evidence.

Charles L. Brimhall.

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Defendant objects on grounds already stated. 169
Objection overruled. Defendant excepts.
Marked Plaintiff's Exhibit "I."

Questioned by Mr. Mitchell:

I think I have identified the deposit slip now shown me as being also in the handwriting of George N. O'Brien, cashier.

Plaintiff's counsel offers in evidence the deposit slip last referred to.

Objected to on the ground that it is merely Mr. O'Brien's declaration or statement, and that it is not sufficiently proved. Objection overruled. Defendant excepts.

Marked Plaintiff's Exhibit "J."

170

The deposit slip shown me is in George N. O'Brien's writing.

Plaintiff's counsel offers the deposit slip in evidence.

Same objection; also on the further ground that the final answer of the witness is that he has no recollection about it. Objection overruled. Defendant excepts.

Marked Plaintiff's Exhibit "K."

This deposit slip is also in the handwriting of George N. O'Brien, cashier.

Plaintiff's counsel offers the deposit slip in evidence.

171

Same objection, ruling and exception.

Marked Plaintiff's Exhibit "L."

From these deposit tags which have been received in evidence I made entries in the ledger to the credit of J. W. Collins in the regular course of business, and they appear there in their regular chronological order. (Handing witness book.) This book is the regular teller's book kept by Mr. Gregg, the teller.

172 Questioned by Mr. Strong:

The book was kept by Mr. Gregg. There are some different handwritings in it.

Questioned by Mr. Mitchell:

The figures down at the foot of the page, additions and summaries from day to day, are in the handwriting of Mr. Gregg, and the detailed specifications of what those summaries consist of are some in the handwriting of Mr. Harry O'Brien. The note at the foot of the page specifying the details of the cash on hand is in the handwriting of Mr. Gregg.

173 Plaintiff's counsel again offers the book in evidence.

Objected to as not sufficiently proved; also as incompetent, immaterial and irrelevant.

The Witness: This is the record in the due course of business of all the cash transactions during the day from which the balance is made up at night. The entries were made during the day and, of course, these footings were made at the end of the day. Entries were made during the day by the teller as he received deposits.

By Mr. Strong:

174 The teller did not make all of the entries in the body of the page; he made the footings, but not all of those in here (indicating). Harry O'Brien, the note clerk, wrote a part of the body of the page, and he made the exchanges for the different banks and the draft. That was the teller's book. There was no other book which the teller kept of receipts and payments as receiving or paying teller, unless the one previous to this, one of the same kind. That is the only book he kept. He made daily entries in that book. He made the debit and credit entries; several are entries in his own handwriting. All these were made under his directions and in his presence. The verification of the addi-

Charles L. Brinhall.

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tions were made by him. The statement of what 175
the cash balance consisted on each day was made by
him.

(Plaintiff's counsel offers in evidence the teller's
book above referred to.)

Questioned by Mr. Strong:

Mr. Gregg did not personally make all the entries
in the body of the page. There are a good many
which he did not make. Mr. Harry O'Brien made
some of them. Possibly I made some of these in
here, listing the checks, the amounts. The figures
at the bottom of the page, the additions, show the
amount of cash on hand and are in Mr. Gregg's own 176
handwriting. Some of them are additions of the
body of the page, the others were the amount of
cash on hand and the balance brought forward. Mr.
Gregg directed these to be made because he had
charge of them; he had charge of the books. I was
present when he gave directions as to some of the
entries. He directed to list the checks and deposits.
He directed me to make some of them and I think
he directed others to make some. I see some of
the figures are mine. I recognize all the different
figures, and know who wrote them.

Defendant's counsel objects to the offer of the
whole book in evidence, on the ground that it is
not sufficiently proved; and as incompetent, 177
immaterial and irrelevant as against the defend-
ant. Objection overruled. Exception by de-
fendant.

Book marked Plaintiff's Exhibit "M."

Questioned by Mr. Mitchell:

The entry under date of September 22d, "certifi-
cate," means the amount of certificates of deposit
paid. There is no such entry under date of Septem-
ber 22; nothing was paid on that date for certifi-
cates. On September 21st \$2,302 was paid on certi-

- 178 ficates; that is the only memorandum here. I find nothing under date of September 22d. Those signatures to certificates of deposit 6800 and 6801 are in the handwriting of George N. O'Brien. They are dated September 22, 1891. Number 6800 is for \$7,500, and 6801 is for \$8,500.

Plaintiff's counsel offers in evidence the two certificates referred to.

Objected to as incompetent, immaterial and irrelevant; that no loss in regard to them is stated in the proof of claim or in the bill of particulars; and on the ground that no loss occurred before action brought. Objection overruled. Exception by defendant.

179

Marked plaintiff's Exhibits N and O.

(Handing witness check.)

The signature to this check is that of J. W. Collins.

Plaintiff's counsel offers the check dated September 22, 1891, in evidence.

Objected to as incompetent, immaterial and irrelevant; and that it is no evidence in any event against the surety, and that there is nothing to show whether it has or has not been paid.

- 180 Mr. Mitchell: This is signed by Mr. Collins, and I propose to follow it up by proof that the check was never entered in the ledger account against him.

Objection overruled. Exception by defendant. Marked plaintiff's Exhibit "P."

Q. Will you turn to the ledger account and state whether on or about that date there is any debit against Mr. Collins' account.

Objected to on the same grounds as before stated, in reference to the books; and on the further ground that if it should appear that there

Charles L. Brimhall.

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was no such entry, there is no evidence that it is lacking because of any fault of George N. O'Brien. Objection overruled. Exception by defendant. 181

Q. Was that check ever charged to Collins' account?

Same objection, ruling and exception.

A. No, sir.

Q. Did it ever go into the teller's cash at all?

Same objection, ruling and exception.

A. I don't know.

Q. But you know it was never charged to the account? A. Yes. The four checks shown me were signed by J. W. Collins. 182

Plaintiff's counsel offers the four checks in evidence.

Objected to on the grounds previously stated; also on the ground that none of them are set up in the proof of claim or bill of particulars, and that at least one of them is prior to the date of the bond.

The Court: How is that evidence material?

Mr. Mitchell: I do not think it is essential to our recovery, because we have enough without.

Mr. Paige: We want to show that at the time of these transactions Mr. Collins owed to the bank about \$300,000 and that the cashier knew it, and at least \$100,000 of it was got in the same way, by crediting the account. 183

The Court: I suppose it is proper for you to show that, but not necessary.

Objection overruled. Defendant excepts.

Check dated May 23, 1891, is marked Plaintiff's Exhibit "Q."

184 Q. Was that check ever charged against J. W. Collins in the account?

Same objection, ruling and exception.

A. I don't think it was. None of these checks ever went to me as bookkeeper from the teller. Exhibit Q has not been entered against Collins' account.

Q. The next one is July 20, 1891; was that check ever charged against Mr. Collins' account?

Same objection, ruling and exception.

A. No, sir.

185 Check dated July 20, 1891, marked Plaintiff's Exhibit R.

Check dated September 16, 1891, marked Plaintiff's Exhibit S.

Q. Was that ever entered against J. W. Collins?

Same objection, ruling and exception.

A. No. I never received, as bookkeeper, from the paying teller these last few checks which have been offered in evidence. The body of the two papers, which have been marked for identification G and H, are in the writing of Harry O'Brien and the signature is that of J. W. Collins.

186 Plaintiff's counsel offers the two notes referred to in evidence.

Objected to as incompetent, irrelevant and immaterial; that they are not mentioned in the proof of claim or the bill of particulars; and that they are in no way covered by the terms of the undertaking.

The Court: Are these Collins' notes?

Mr. Mitchell: They are Collins' notes to the bank. I offer them for the same purpose as the other, to show the indebtedness to this bank.

The Court: I suppose it is necessary for the plain-

tiff in this case to show that there was connivance 187
between the cashier and Collins, or at any rate that
the cashier acted dishonestly. Now, this general
evidence of the state of the account of Collins with
the bank is competent.

Objection overruled. Exception by defend-
ant.

The notes are marked plaintiff's Exhibits T
and U.

The Court: I should like to know what the fact is
about this notice which is alleged to have been sent
June 18th. Was there any such notice sent?

Mr. Strong: Does your Honor mean June 18th, or 188
July 18th?

The Court: They amended their bill of particulars
and their complaint by alleging that they sent notice
June 18th. Now, if that is so, there is something of
this case, and if it is not so, there is not anything of
it. I want to find out whether they sent any such
notice. If it is true, as alleged, that notice was not
sent until July 18th, I don't see how the plaintiff
can recover.

After argument by counsel, and reading of
correspondence, the Court ruled that counsel
proceed with the evidence.

CROSS-EXAMINATION by Mr. Willcox:

There were six clerks in the employ of the Cali- 189
fornia National Bank prior to the 1-th day of No-
vember, 1891, S. C. Gregg, George N. O'Brien, H.
E. O'Brien, W. B. Rogers, J. E. Keller and myself,
D. D. Dare was Vice-President. I remember the
certificate of deposit book which Harry O'Brien had,
from which the certificates of deposit identified by
me to-day were taken. H. E. O'Brien, the book-
keeper, usually filled them out. The cashier some-
times signed a number of blank certificates of de-
posit in that book and left them so signed with the
bookkeeper; not always, he often did so. The last

- 190 time I saw the certificate of deposit book was last Friday, I think. There were then in it a number of certificates of deposit signed in blank, three or four, I think; I did not notice just how many. I was in the employ of the bank on the 22d day of September, 1891. I do not remember whether on that day Mr. Collins was in San Diego, or not. I have no way of fixing the fact that I know of. Possibly some of the entries in the books would refresh my memory, but I do not know of any. The date of these certificates does not fix that fact in my mind. I do not remember that Collins left San Diego in the latter part of September, 1891. I know he was away for about two months or so immediately
- 191 prior to the failure of the bank, but I do not remember the day he went. He came back to San Diego I think in October, or some time along about the 4th of November, 1891. He was away six or eight weeks I think. According to that he was certainly away on the 13th and 14th days of October, and as nearly as I can recollect he was away on the 31st day of October, 1891. At that time J. W. Collins, D. D. Dare, Mr. Pulsifer, Mr. Havermale, Mr. Burns and Mr. Gay were directors of the bank. Mr. Pulsifer lived in the East, but I do not know what place. He did not live in San Diego. I have seen him there, but I do not remember what time of the year it was, or what
- 192 year it was, but I know he was there a couple of times. It is a fact that Mr. Pulsifer was not in the habit of attending to any of the business of the bank during the summer and early fall of 1891. It is true that Mr. Dare was absent during the summer and early fall of 1891. In the month of October of that year, I think, Mr. Havermale was sick and confined to his home. Mr. Collins, the other director, was away. During that time Mr. George N. O'Brien and his assistant clerks had charge of the bank. Mr. George N. O'Brien at that time was about 21 years, I think. Prior to the time when he was elected cashier he was stenographer and type-

writer and correspondent in the bank. While he 193
held that position Mr. William Collier was president,
and he was president up to the time Mr. Collins was
elected president, and while Mr. Collier was presi-
dent Mr. Collins was cashier and George N. O'Brien
stenographer and typewriter. I think in January,
1891, there was an election of officers at the bank,
and at that time Mr. Collins was elected president
and Mr. George O'Brien was elected cashier. There
was no real change after that election in the man-
agement of the bank that I noticed or that I ob-
served.

Questioned by the Court:

After that O'Brien began to act as cashier. There 194
were directors' meetings during 1890 and 1891. They
were held in the bank. I never attended any and I
do not know what directors attended. I saw Mr.
Havermale, Mr. Burns and Mr. Gay attend such
meetings. I do not know whether any of the di-
rectors took any actual personal participation in the
management of the bank. They would come in
there quite often, but I do not know that they ever
looked over the books much or securities, of my
knowledge.

Questioned by Mr. Willcox:

I do not know of any investigation of the affairs 195
of the bank made by the directors. I was in the em-
ploy of the California National Bank from March 1,
1888, until its close. I think the bank was organized
in the latter part of 1887, and commenced business, I
think, January 9, 1888. I think Mr. Collins and Mr.
Dare were the organizers of the bank. I think Mr.
Collins was one of the largest stockholders of the
bank. I do not know to what extent. I kept Mr.
Collins' account in the books of the bank; his ac-
count was one of the largest in the bank. It was
not to my knowledge used for any other purpose
than Mr. Collins' private transactions. I was exam-

196 ined as a witness on behalf of the plaintiff in this action at San Diego, California, in the month of August, 1894, being duly sworn to tell the truth. At that examination the plaintiff was represented by Judge Luce, his counsel. The testimony which I gave in that deposition was true to the best of my knowledge.

Q. I read to you from your deposition this question and answer, at page 70: "Q. Was not Mr. Collins' account used as a clearing house for the bank? A. I had not thought of it before, but I suppose you might use it in those terms." Do you remember that question and that answer? A. I do.

Q. Do you recollect making that reply? A. I do.
197 Q. Was not that true? A. I think that an explanation of that answer was given later.

Q. Was not the reply as you then made it, true?
A. Yes, sir.

By the Court:

Q. What do you mean when you say it was used as a clearing house? A. I did not understand the exact meaning of his words and so I supposed.

Q. You had some idea when you said the account was so used. What did you mean by it? You must have meant something? A. In regard to those credits, I thought that perhaps there were some of those credits that ought not to have been there.
198 That is why I made that answer.

By Mr. Willcox:

Q. I read you another question: "Q. To pass things into his account and out of his account that were really for the interests of the bank and not Mr. Collins was an every day transaction, was it not? A. I think so." Do you remember that question and that answer? A. Yes, sir.

Q. The next question: "Don't you know so? A. Well, I know from the appearance of things. Q. You knew so from the facts surrounding the trans-

action? A. Yes." Do you remember those questions and those answers by you made? A. Not distinctly. 199

Q. Haven't you any recollection of so testifying? A. Yes, sir; I have.

Q. The next question: "Q. You made the entries in Mr. Collins' account in the books? A. Yes, sir.

Q. Is it not a fact that it was by you, at the time of your employment in the California National Bank, known that Mr. Collins' account was commonly known as the 'waste basket'? A. No." Do you remember that question and that answer? A. Yes.

Q. "Q. Or by some such similar term? A. No, sir. Q. Still, do you remember that this account was used for many transactions of the bank in which he apparently had no interest? A. Yes, sir." 200
Do you remember that? A. Yes, sir.

Q. You draw a distinction, do you not, between items properly chargeable to Mr. Collins' account and items chargeable against him? A. Yes, sir.

Q. "Q. So when you say that Mr. Collins' account was not, to your knowledge, charged with items not properly chargeable against that account, you do not mean, do you, that they were properly chargeable against him? A. I do not mean that they were properly chargeable against him." Do you remember that testimony? A. Yes, sir.

Q. "Q. Is it not true that this account was often charged with items, sometimes, for the purpose of getting a transaction off the books, which was placed there for the convenience of the bank? A. Yes, sir." Do you remember that testimony? A. I think I do; yes, sir. 201

Q. Was it true? A. I think so.

By the Court:

Q. What do you mean by "transactions"? A. The same as any other transaction of the bank; the cash transactions; entries that we had to make.

202 By Mr. Willcox: Don't you really mean that transactions were carried on in Mr. Collins' name for the benefit of the bank? A. I think there were some.

Questioned by the Court:

I do not remember any particular instance that I can give you so as to explain what I mean by these transactions. I refer to some of the large amounts, deposits and checks—large entries in Collins' account. I mean to say in reference to them that I do not know anything particular about the transactions themselves. All I knew or thought from each was the supposition that I thought they were for the interests of the bank. I do not mean to say that I ever had any actual knowledge of any items which were charged to Collins' account at the time I made the entries which really should have been charged to the bank or which represented debits of the bank. These questions were put in such shape as to make me answer as I supposed. I do not know actually anything about the actual transactions. I did not know what they were, but I supposed from some of the entries that they should have been made differently.

Questioned by Mr. Willcox:

204 I think the testimony given by me here on this trial has not been given on the theory of my suppositions. I think I testified yesterday to what I knew, I testified to-day to what I know. When I was asked if those questions had been put to me and I made the answers which were recorded, and I answered that I gave that testimony and that it was true, I meant that it was true as I supposed. I live in San Diego; I came to New York last week. Nobody came with me. The day I arrived I met Mr. Pauly and have been with him every day since except Sunday. I only spent a little while, a part of a day, going over the books and papers of the California National Bank. I do not know that while it trans-

acted business the California National Bank often borrowed money itself or procured its paper to be rediscounted. 205

The Court: I suppose some experts are going to be put on the stand, are they not, who have examined these books?

Mr. Mitchell: Yes, sir.

The Court: They are the ones to get this information from.

In the ordinary course of business the paid checks of the bank were stamped paid. I know of my own knowledge that some of them had actually been paid. I supposed that they were all paid. If they were handed to the bookkeepers to be charged up they were supposed to be paid. 206

Q. I show you a check dated November 9, 1891, to the order of the California National Bank, apparently signed by J. W. Collins, for \$19,500, and I ask you to look at the paid stamp on that check and tell the jury the date of that paid stamp (handing witness paper)? A. February 2, 1892.

Mr. Paige: I admit that that stamp was put on that check by the expert accountant of the Receiver, five weeks after the Receiver took possession, and has nothing to do with the transaction. We are going to show when our time comes if we can that that check was a part of the cash items. 207

The Witness: I do not know that there were other checks stamped paid which had not been paid. As requested, I turn to the ledger which contains the entry as to which I have testified with the credit on October 12th or 13th of \$24,500. The entry is on October 13, 1891. In the account of the United States National Bank of New York, I find a charge against that bank of an equal sum on that day. I did not keep that book. It was kept in the bank by a double entry system, consequently where there was a charge to the United States National Bank on that day there must be a

208 credit somewhere. I turn to the credit to which I have testified, to Mr. Collins' account, on the same day of \$20,000, of which I have spoken in connection with the Western National Bank of New York, and in the account of the Western National Bank I find a charge against that bank on that date of the same sum.

The general ledger is put in evidence by the plaintiff.

There having been a charge to that bank on that day, there must necessarily, under the system of bookkeeping which prevailed in that bank, have been a credit. I do not find in the account of Col-
209 lins any credit to him for the proceeds of certificate of deposit 6800 for \$7,500, of which I have spoken in connection with the Western National Bank. I find an entry of \$20,000 marked "First National" and "Western," dated October 31, 1891, in Mr. Collins' account. I do not know how it is divided. It is not marked that way here, the deposit slip will show how it is divided. I do not find an entry on the debit side of Mr. Collins' account showing that that credit was on that day, or very shortly afterwards, wiped off by a check to the California National Bank of an equal amount. It is contained in another item. I find a \$10,000 check
210 here on the 9th of November, so it appears on the book that that \$10,000 item of the Western National of October 31, 1891, was straightened up by a debit on the 9th of November, 1891. Looking at the credit of \$10,000 which is made in Mr. Collins' account on the apparent basis of the transaction with the First National of Chicago, I do not find it shown that the California National Bank drew on the First National Bank of Chicago for that \$10,000.

By a Juror:

Q. Were there two accounts of Collins? A. No sir.

Charles L. Brimhall.

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Questioned by Mr. Willcox: •

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I have not intended to testify concerning more than one account of Mr. Collins, and when I have spoken of items which I considered properly chargeable against Mr. Collins' account and items which I considered properly chargeable against Mr. Collins, I simply meant to draw a distinction as to the propriety of charging Mr. Collins individually for his own use. The distinction that I meant between Mr. Collins' *account* and Mr. Collins himself, I meant there his personal account, not his business account. Some people have a private account and a business account. This is the way I divided that.

By the Juror:

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Q. Is it divided on the books? A. No, sir.

By Mr. Willcox:

Q. By his business account, do you mean the account which was for the benefit of the California National Bank? A. Not necessarily. His business account might have been any business.

By Mr. Mitchell:

Q. May I ask whether there was any business account of Mr. Collins separate from this account? A. No, sir.

By Mr. Willcox:

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Q. Did not Mr. Collins give direct instructions to the clerks in the bank while he was there as president? A. Yes, sir.

Q. Please tell us to what extent Mr. Collins personally participated in the management of the bank after O'Brien became cashier? A. He acted as president, but I do not think I can give any more facts about that.

Questioned by Mr. Mitchell:

The signature to the paper shown me is in the handwriting of J. W. Collins. It is a check for

- 214 \$19,500; I saw it in with the cash. It seems to me I saw it somewhere in the neighborhood of a week prior to the 11th of November, 1891. The stamp there in red letters was not there at that time.

Plaintiff's counsel offers the check in evidence.

Objected to as immaterial, incompetent and irrelevant. Objection overruled. Exception by defendant.

Marked Plaintiff's Exhibit "V."

- That is entered in the individual account of J. W. Collins, February 2, 1892. The deposit slip now shown me is in the handwriting of Harry E. O'Brien.
215 The deposit slip now shown me is in the handwriting of George N. O'Brien.

Plaintiff's counsel offers in evidence the deposit slip last referred to.

Objected to as incompetent, immaterial and irrelevant; that it is not mentioned in the proof of claim or bill of particulars; that it is not shown to have been procured by Mr. Collins; that it occurred before the date of the bond; that even assuming that it represents what the plaintiff seems to claim, a false credit upon the books of the bank, it is not admissible to charge the defendant in this action on account of its being prior to the date of the bond.

- 216 Objection overruled. Exception by defendant.

Marked plaintiff's Exhibit "W."

The deposit slip shown me is in the handwriting of George N. O'Brien.

Plaintiff's counsel offers the deposit slip referred to in evidence.

Same objection, ruling and exception.

Marked plaintiff's Exhibit "X."

Plaintiff's counsel offers in evidence the deposit slip of May 2, 1891, for \$40,000, in handwriting of Harry E. O'Brien.

Mr. Strong: I object to that on the ground that 217
we have nothing to do with the acts of H. E.
O'Brien.

The Court: It is proper for them to give evidence
by which the jury can find that they have sustained
some loss.

Objection overruled. Exception by defendant.

Package of deposit slips produced is marked
as one package, Plaintiff's Exhibit "Y."

I never saw any certificate of deposit signed in
blank by George N. O'Brien. I have seen such cer-
tificates signed in blank by J. W. Collins.

Questioned by Mr. Willcox:

218

When I say I saw that check in the cash, I mean
the teller's cash—in the possession of the teller.

GEORGE S. HICKOK, sworn and examined as a wit-
ness for the plaintiff.

Questioned by Mr. Mitchell:

In the year 1891 I was and am still cashier of the
National Park Bank. On the 25th of March, 1891,
we had dealings with the California National Bank
of San Diego.

Q. Will you state what the transaction was?

Objected to as incompetent, immaterial and 219
irrelevant; that it antedates the bond; that it is
not mentioned in either the proof of claim or
the bill of particulars; and that it is in no way
admissible or sufficient to charge the defendant
with any loss under the bond. Objection over-
ruled. Exception by defendant.

A. On that day the Park Bank loaned the Cali-
fornia National Bank of San Diego on a note of
\$25,000. A joint note was made by J. W. Collins,
S. G. Havermale and William Collier. There was
no other security on that transaction.

220 Questioned by the Court:

We discounted that note for the California National Bank for \$25,000—the note made by these three parties jointly.

Questioned by a Juror:

It was discounted for the California National Bank and credited to their account.

Questioned by the Court:

221 The note was endorsed by the California National Bank of San Diego. It was made by Collins and the parties I have mentioned; bore the endorsement of the California National Bank, and went to their credit in the bank, in the general account.

Questioned by Mr. Mitchell:

It was checked out.

Questioned by the Court:

I have not the note, but that is the usual way of endorsing by a bank; that is, to endorse by its president, and I presume this note was endorsed by Collins as president.

Questioned by Mr. Mitchell:

222 That is the note.

Plaintiff's counsel offers the note in evidence.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit "AA."

The credit was given to the bank and not to Mr. Collins. On June 10, 1891, we had a transaction with the California National Bank. The date appears on our discount book.

Q. What was the transaction?

Same objection, ruling and exception.

George S. Hickok.

77

A. We on that date discounted for the California National Bank of San Diego \$20,000. In this case it was their own note endorsed by J. W. Collins and S. G. Havermale; a \$30,000 bond of the San Diego Cable Railway was given as security. 223

Questioned by the Court:

We discounted the \$20,000 note and gave the bank credit for \$19,815.89, being the amount of the note less the interest.

Questioned by Mr. Mitchell:

That is the note.

224

Plaintiff's counsel offers the note in evidence.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit "BB."

The amount of this note was also checked out.

Plaintiff's counsel offers in evidence renewal note.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit "CC."

I think that my bank has received one or more dividends from the Receiver of the California National Bank on the total amount of the indebtedness. I have not the book before me to show what the actual amount of the dividend is. 225

Questioned by Mr. Strong:

The last dividend was, I think, within the last six months past. I cannot remember when the first dividend was received; I should say not within a year.

- 226 HENRY A. SMITH, sworn and examined as a witness for the plaintiff:

Questioned by Mr. Mitchell:

In the year 1891, I was and still am cashier of the Western National Bank of New York. We had dealings with the California National Bank of San Diego, on or about the 13th or 14th of October, 1891.

Q. Will you please state what the transaction was?

Same objection as stated to a similar question put to the previous witness. Same ruling and exception.

227

A. The bank made a loan to the California National Bank of San Diego, of \$20,000. I think it was October 12, 1891. By the way, I don't know where my books are. The books were sent down here. We credited the California National Bank with the proceeds of the \$20,000 loan. I think the transaction to which I have just testified occurred on October 12th. It was October 12th, or thereabouts. There was no other transaction between the first and the 30th of October, that we had with him in the nature of a loan. That was the only loan we made to them, and that loan was by the Western National Bank to the California National Bank of San Diego, and not to J. W. Collins.

228

Our bank did not have any other transaction in the nature of a loan with the California National Bank of San Diego on or about the 31st of October. There was only one loan, that was the loan which I have said occurred about the 12th of October. The proceeds of the loan went to the credit of the California National Bank of San Diego and it was checked out in the ordinary course of business. (Examining book.) The amount passed to the credit of the California National Bank was \$19,690 on the security of promissory notes amounting to \$36,250. (Handing witness paper) This paper seems to be the

original note of \$20,000. That is the note of the 229
 California National Bank of San Diego, by J. W.
 Collins, President, guaranteed and endorsed by J.
 W. Collins, individually. The credit was given to
 the bank and not to J. W. Collins. My bank has
 received a dividend on that loan from the Re-
 ceiver, I think, to the extent of about 35 per cent.

Plaintiff's counsel offers in evidence the note
 for \$20,000.

Objected to on the same grounds specified as
 to the other notes; and upon the further ground
 that the transaction upon its face was one which
 created no liability of the California National
 Bank, and therefore there was no loss from it; 230
 any payments made were voluntary. Objection
 overruled. Exception by defendant. Marked
 plaintiff's Exhibit "DD."

Questioned by the Court:

This discount of the \$20,000 note was made by
 the bank and it was endorsed by Collins and secured
 by several other notes, which I assumed to be bank
 paper.

CROSS-EXAMINATION by Mr. Strong:

The proceeds were credited to the bank and
 were drawn out in the course of time in the
 usual way. I cannot say just when I made a claim 231
 against the Receiver. I have no memorandum to
 show. Our assistant cashier may be able to do
 so; he has charge of filing the proof of claim.
 This paper is an affidavit signed by me and verified
 by me, and it was made at the time the verification
 bears date, March 5, 1892, and I presume was sent
 to the Receiver at that time. I believe there was
 some objection made to it, but it was finally al-
 lowed. I cannot state what the objection was
 definitely. I think there are letters from the Re-
 ceiver on the subject. It may be in the memoran-
 dum brought by the assistant cashier.

232 By Mr. Mitchell:

We got that note and made the loan in the regular course of business, without any notice of any defect in the note. We advanced the money on the faith of it in the usual course of business.

Proof of claim, produced by the plaintiff, Mr. Pauly, is, at the request of the defendant, put in evidence. Marked Plaintiff's Exhibit "EE."

Defendant's counsel offers in evidence the letter dated March 28, 1892, from Mr. Pauly to the defendant.

Marked Defendant's Exhibit I.

233

By a Juror:

This money was drawn out by the bank, not by Mr. Collins? A. By the bank; not by Mr. Collins.

Questioned by Mr. Mitchell:

I mean it was checked out by the San Diego Bank.

The Juror: Charged to the bank.

The Court: If I understand your theory, it is that Collins account, his private account, in his own bank, the San Diego Bank, was credited with this amount.

234 Mr. Mitchell: Exactly.

The Court: When in fact it was a note in which was made by the bank and charged to the bank, and it ought to have been credited to the bank.

The Juror: I understand it was credited to the bank.

Mr. Mitchell: This transaction, as testified to, I understand is, that these banks here in New York credited to the California bank certain sums of money, which authorized the California bank to collect that money from here.

Mr. Strong: I object to any further statement until it is proved.

Henry C. Hopkins.

81

Mr. Mitchell: It is proved.

235

The Court: It seems at that same time Mr. Collins personally was credited in his private account with his own bank with the amount of these discounts.

Mr. Mitchell: That is exactly it.

Mr. Strong: An amount equal, but the connection between the two has not been proved yet.

Mr. Paige: The credit was made by Mr. O'Brien in his own handwriting.

The Juror: On these books?

Mr. Paige: Yes.

The Juror: Do I understand that the credits made on this book were made by Mr. O'Brien and not by the bookkeeper?

236

Mr. Mitchell: By direction of O'Brien.

Mr. Paige: Mr. O'Brien made out the deposit slip in his own handwriting.

HENRY C. HOPKINS, sworn and examined as a witness for the plaintiff:

Questioned by Mr. Mitchell:

In 1891 I was and still am cashier of the United States National Bank of New York City. On the 12th day of October, 1891, the United States National Bank had a transaction with the California National Bank of San Diego.

Q. What was the transaction?

237

Objected to on the same grounds previously stated. Objection overruled. Exception by defendant.

A. We rediscounted for the California National Bank two of their bills discounted, and placed the proceeds of the same to the credit of the California National Bank. The amount of the proceeds passed to their credit was \$7,595.27. On the next day there was a subsequent transaction.

Q. Please state what that transaction was?

Same objection, ruling and exception.

- 238 A. On October 15th we discounted the note of the California National Bank and placed the proceeds to the credit of the California National Bank, namely, \$17,316.25. The collateral to that note was six of their bills discounted, aggregating \$32,000 and odd. The two together made the amount of the loan \$24,000 and odd.

Questioned by the Court:

The face of the obligations was \$25,180.

Questioned by Mr. Mitchell:

- 239 The amount of the above credits was checked out in the regular course of business. This is the note of \$17,500 which was discounted on October 13th. In both instances the credit was given by my bank to the California National Bank of San Diego, and not to J. W. Collins.

Plaintiff's counsel offers the note in evidence.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit "FF."

Questioned by the Court:

The \$17,500 note was made by the bank; the other notes were bills discounted of the customers of the California National Bank and rediscounted with us.

- 240 Questioned by a Juror:

I cannot tell from memory whether they were paid or not. The \$17,500 note had as collateral six notes aggregating \$32,160.50. I cannot tell from memory how many of these notes were paid. We still have a claim against the bank. We hold a Receiver's proof of claim for between \$4,000 and \$5,000 on which we have received dividends of, I think, 35 per cent. All the rest were paid out of the collateral which we held. The first note was rediscounted. We hold the bank on their endorsement; there was no collateral note.

Harry B. Fonda.

83

Questioned by Mr. Mitchell:

241

These are the only transactions in the way of loans between my bank and the California National Bank. My bank did not at any time loan to J. W. Collins individually.

No cross-examination.

HARRY B. FONDA, sworn and examined as a witness for the plaintiff:

Questioned by Mr. Mitchell:

In the year 1891 I was a loan clerk of the Western National Bank.

Q. Will you look and see what, if any, transaction your bank had in reference to a certificate of deposit of the California National Bank? 242

Same objection, ruling and exception.

A. There is a loan here which was made on October 7, 1891. The bank took a note signed by W. R. Stebbins and J. W. Collins. The amount of the note was \$7,560. We received as collateral a certificate of deposit of the California National Bank, of San Diego for \$7,500.

Questioned by the Court:

We discounted a note of W. R. Stebbins and J. W. Collins, signed by each of them, and we received as collateral to that note a certificate of deposit of the California National Bank of San Diego. Plaintiff's Exhibit O is the certificate of deposit to which I have referred, to the best of my knowledge. That loan was made to W. R. Stebbins and J. W. Collins, the note being signed by those two men. It was paid by giving a check for \$7,500 to Mr. Collins. We have at the bank this returned check, paid. 243

Questioned by the Court:

I drew the check for \$7,500—drew it to the order of J. W. Collins—and he received it. Of course, the

214 check must have come back in the ordinary course of business to our bank.

Court directs the check to be produced.

Plaintiff's counsel reads from the deposition of

SAMUEL N. WOOD, taken at Denver, Colorado, on behalf of the plaintiff, as follows:

I live in Denver and am fifty years old. I am not engaged in any active business. I was acquainted with Mr. J. W. Collins and must have known him twelve or fifteen years. I cannot give a more definite reply. As to his business, he was, during the
245 latter part of his life, president of the California National Bank of San Diego, California. I knew him in Cheyenne a good many years before he went to California. For the ten years ending in 1891, I was cashier of the First National Bank of Denver, Colorado.

Q. State whether or not during the time you were cashier of the First National Bank of Denver you ever had any transaction with Mr. Collins in which the California National Bank of San Diego, California, was interested or in any way appeared to be?

246 Objected to as incompetent, immaterial and irrelevant, and that it is not mentioned in the proof of claim or bill of particulars. Objection overruled. Exception by defendant. (Objection on ground "that it is not mentioned in the proof of claim or bill of particulars" not taken at time of examination of witness).

A. In the month of June, 1891, I think. I have no date to go by now, I loaned Mr. Collins \$25,000. The transaction, however, was an individual one on my part; had nothing to do with the First National Bank of Denver. As collateral to it I took as security some certificates of deposit issued by the California National Bank.

Defendant's counsel moves to strike out the 247
answer to the above question on the ground that
it appears to be prior to the date of the bond,
and for the reasons stated in the above objec-
tions.

Motion denied. Exception by defendant.

Q. If you have those certificates of deposit please
attach them hereto; if not, please describe the kind
of certificates they were?

Objected to on the grounds above stated, also
on the ground that it is not the best evidence.
Objection overruled. Exception by defendant.
Objection on ground "that it is not mentioned
in the proof of claim or bill of particulars;" not 248
taken at time of examination of witness.

A. To the best of my recollection there were
three certificates, two of \$7,500 and one of \$10,000;
although I may be mistaken as to the amount of
each, I know the aggregate amount was \$25,000. I
have not got them in my possession.

Plaintiff's counsel offers in evidence three cer-
tificates to the order of J. W. Collins, of the date
of May 23, 1891, two of them being for \$7,500
each and the other for \$10,000, purporting to
certify that J. W. Collins has deposited in the
bank the sums above stated, respectively, and
signed George N. O'Brien, Cashier. 249

Same objection, ruling and exception.

Marked Plaintiff's Exhibits "HH," "II" and
"JJ."

Q. Please state in full what conversation you had,
if any, with Mr. Collins in regard to said certifi-
cates and what application he made of the money
raised upon them, if you know?

Objected to on the grounds heretofore stated
and on the further ground that in no way could
Mr. O'Brien's honesty or dishonesty be affected

250 by a conversation had in Denver. Objection overruled. Exception by defendant.

Objection on ground "that it is not mentioned in the proof of claim or bill of particulars," that in no way could O'Brien's honesty or dishonesty be affected by a conversation had in Denver, not taken at time of examination of witness.

A. At the time I made the loan to Mr. Collins he said that his bank was anxious to buy a certain corner in San Diego, and as they had use at that time for all the money they had to spare, they preferred to raise the money in this manner to purchase this corner, on which they intended to build eventually.
251 That was the explanation he made to me for having the certificates of deposit with him, and for using them in the manner which he did. At his request I gave him a draft on Chicago for \$25,000, drawn by the First National Bank of Denver. I do not now recollect the name of the bank in Chicago on which the draft was drawn, but I am very positive that is the manner in which I paid it. I think it was the Chicago National Bank. I would state that of my own knowledge I have no information as to what he did with this draft. At that time we kept an account with the Commercial National Bank of Chicago, and the draft may have been drawn upon it.
252 Mr. Collins made no statement to me to the effect that the entire amount loaned to him was to be applied for the purpose which I have named, or if not the entire amount, what proportion thereof was to be used, or what disposition or application was to be made of the residue of said draft. He made no statement further than those I have stated. The loan was made at the request of Mr. Collins to him individually, he giving his individual note for the loan, with these certificates of deposit which I secured as collateral.

(No cross-examination.)

Plaintiff's counsel reads from the deposition of— 253

JOHN C. MITCHELL, taken at Denver, Colorado, as follows:

My name is John C. Mitchell. I am 34 years old and I reside at Denver, Colorado, and am cashier of the Denver National Bank. I have been such cashier since March, 1891, I think. My impression is that I met J. W. Collins on the 12th day of June, 1891, for the first time. He occupied the position, at that time, of president of the California National Bank of San Diego.

Q. State whether or not at any time, either as an individual or as cashier of the Denver National Bank, you had any transaction with Mr. Collins in which the California National Bank of San Diego was in any way interested or connected, and, if so, state what transaction took place and what it was? 254

Objected to on the ground heretofore stated.

Objection overruled. Exception by defendant. (Objection on ground "that it is not mentioned in the proof of claim or bill of particulars" that in no way could O'Brien's honesty or dishonesty be affected by a conversation had in Denver, not taken at time of examination of witness.)

A. To begin with, J. W. Collins owed our bank something like \$5,000 and interest, and on the 12th day of June, 1891, he came into the bank with a draft drawn by the First National Bank of Denver, payable to his order, for \$25,000. He requested me to pay his individual indebtedness out of the draft and place the balance to the credit of the California National Bank of San Diego, which I did. 255

Q. State if you recollect upon what bank this draft was drawn? A. The draft was drawn on the Commercial Bank of Chicago. My bank applied a portion of it to pay the individual indebtedness of J. W. Collins and the balance was placed to the credit of the California National Bank of San Diego.

256 §5,116.65 was used to pay the individual debt of Mr. Collins. I deducted the amount of the credit to the California National Bank of San Diego and it made that difference. The indebtedness was the individual debt of J. W. Collins.

Q. State, if you know, whether at the said time or at any time any account existed on the books of the Denver National Bank between any of the officers of the California National Bank of San Diego, and especially with Mr. Collins?

257 Objected to by defendant's counsel on the grounds previously stated. Same ruling and exception. (Objection on ground "that it is not mentioned in the proof claim or bill of particulars and that in no way could O'Brien's honesty or dishonesty be affected by a conversation had in Denver, not taken at time of examination of witness.")

A. Neither J. W. Collins nor any of the officers of the California National Bank of San Diego at that time or any other time in the history of the Denver National Bank had any account on the books of the bank.

258 Q. Please state fully the whole transaction had with the said John W. Collins in relation to placing said credit, the ownership of said draft, the party for whom the negotiations were conducted, and what if anything, was said as to who was entitled to the proceeds of said twenty-five thousand dollar draft?

Objected to by defendant's counsel on the ground previously stated. Same ruling and exception. (Objection on ground "that it is not mentioned in the proof of claim or bill of particulars, and that in no way could O'Brien's honesty or dishonesty be affected by a conversation had in Denver, not taken at time of examination of witness.")

A. There was no conversation at that time relative to the ownership of the draft. Mr. Collins brought

the draft in to me, requested me to pay his personal indebtedness and place the balance to the credit of the California National Bank of San Diego. 259

CROSS-EXAMINATION:

The memorandum which I used to refresh my memory in testifying was prepared from the notes made at the time I gave a former deposition concerning this same transaction. I have no means of knowing who prepared this memorandum. The \$20,000 which was placed to the credit of the California National Bank of San Diego was subsequently paid out by my bank for the California National Bank of San Diego. The amount was remitted on June 12, 1891, to the Hanover National Bank of New York to the credit of the California National Bank of San Diego. 260

Plaintiff's counsel reads from the deposition of --

C. J. WHITE, a witness on behalf of the plaintiff, taken at Kansas City, Missouri, as follows:

In the year 1890 I was and still am cashier of the National Bank of Commerce of Kansas City, Missouri, and have been such cashier for about thirty years. The president of said bank is W. S. Woods, and he has been such president for about twelve years. Day before yesterday he was in the City of New York, and I presume he is there now; I don't know. 261

Q. Please state whether the National Bank of Commerce had any dealings with the California National Bank of San Diego on or about December 15, 1890, and, if so, state what the dealings were?

Objected to by defendant's counsel on the same grounds previously stated, and especially on the ground of the transaction being before the date of the bond. Objection overruled and exception.

A. Well, on the 15th day of December, 1890, there was a note given us for \$25,000, payable on demand,

262 for the credit of the California National Bank of San Diego.

Q. And what sum, if any, was placed to the credit of the California National Bank of San Diego?

Objected to by defendant's counsel on the grounds previously stated. Objection overruled and exception by defendant.

A. \$25,000 was placed to their credit on December 15, 1890.

Q. Was that note ever liquidated by the California National Bank, and if so, state when?

263 Objected to by defendant's counsel on the grounds previously stated. Objection overruled and exception by defendant.

Q. Do you know how it was paid? A. The note was paid on March 5, 1891. I do not recollect how it was paid.

Q. Well, please state whether or not you mean to state that on December 15, 1890, the California National Bank received credit in your bank to the amount of \$25,000?

Objected to by defendant's counsel on the grounds previously stated. Objection overruled and exception to the defendant.

264 A. That is true, but the note was marked paid on our books March 5, 1891.

Q. Did the California National Bank ever draw that amount out of this bank?

Objected to by defendant's counsel on the grounds previously stated. Objection overruled and exception to the defendant.

A. No, sir.

This letter, dated February 10, 1891, addressed to the National Bank of Commerce of Kansas City, Missouri, and signed by George N. O'Brien, cashier, was received by the National Bank of Commerce of Kansas City.

Plaintiff's counsel offers said letter in evidence. 265

Defendant's counsel objects thereto on the grounds previously stated. Objection overruled and exception to defendant.

Marked Plaintiff's Exhibit "KK."

Q. Mr. White, I will get you to state why that \$25,000 credit to which you have just referred was not mentioned in the statement which you sent to the California National Bank of San Diego in January, the first day of January, 1891?

Objected to by defendant's counsel on the same grounds. Objection overruled and exception to defendant. 266

A. Why that was not put in the statement—because it was on a special account. That \$25,000 was not to go on the general account. I mean by special account that it was to be placed there and not checked out. The transaction was an agreement between Mr. Collins, I think he was the man; the contract was made with Mr. Woods. I think Mr. Collins is the man that was here; I am not sure. He said he represented the bank and was president of the bank. He represented the bank as the president. That was a transaction between the National Bank of Commerce and the California National Bank.

Q. I will get you to state whether the National Bank of Commerce had a transaction with the California National Bank about the 15th of April, 1891? 267

Objected to by defendant's counsel on the grounds previously stated. Objection overruled and exception to defendant.

A. I have got it the 16th day of April, 1891.

Q. What was the nature of that?

Objected to by defendant's counsel on the grounds previously stated. Objection overruled and exception to defendant.

- 268 A. They borrowed \$20,000 payable on demand, and it was to go to special account as the other. The amount was not drawn against until it was paid. Any draft by the California National Bank against that account would not have been honored by our bank.

REDIRECT-EXAMINATION by Mr. Peake:

- Q. From your knowledge of banking and the customs of banking, would you have been able to determine from the entry made by the bank alone; would you have been able to state from the entry alone that these special deposits were not to be drawn against by the California National Bank? A.
- 269 Yes, sir; it was so stated there in the entries that was given there; it was so stated.

Q. I believe that is all.

CROSS-EXAMINATION:

The \$25,000 note was by Collins and Dare.

Plaintiff's counsel offers in evidence a stipulation between counsel.

Marked Plaintiff's Exhibit "LL."

Plaintiff's counsel reads from the deposition of—

LYMAN J. GAGE, a witness for the plaintiff, taken at Chicago, as follows:

- 270 My name is Lyman J. Gage. I am of lawful age. I reside in the City of Chicago and am president of the First National Bank of that city.

Q. Mr. Gage, please state what you recollect with reference to the negotiation of a loan that Mr. J. W. Collins had with your bank in the spring of 1891, a loan of \$25,000?

Objected to by defendant's counsel on the grounds previously stated. Objection overruled and exception to defendant. (Objection on ground "that it is not mentioned in the proof of claim or bill of particulars, and that in no

way could O'Brien's honesty or dishonesty be affected by a conversation had in Denver, not taken at time of examination of witness.") 271

A. On the 18th of May, 1891, this bank discounted for the California National Bank of San Diego a note made by D. D. Dare, S. G. Havermale, J. W. Collins, T. R. Gay and George N. O'Brien, for the sum of \$25,000, that note being endorsed by the California National Bank, and the proceeds thereof passed to the credit of that institution on the day named, May 18, 1891. The net proceeds of that credit, less the discount for the time the note had to run, was \$24,416.67. Upon a draft of the California National Bank, \$10,000 was remitted to its correspondent in New York for its credit. The balance of the fund was drawn out in checks and drafts in the ordinary course of business. All of the credit was drawn out. The indebtedness growing out of this discount has not been wholly paid by the California National Bank, but we have some dividends. It may have been paid in part. It has been reduced to \$12,500, then afterwards \$2,500 was collected from the note made by one Marston which operated to reduce the Dare-Havermale note to \$10,000. The \$25,000 note spoken of became due on the 15th of September, 1891. On the 17th of that month \$12,500 was paid on it. The California National Bank then made its note for the amount of \$12,500, leaving the Dare-Havermale note as collateral security for the payment of its principal obligation. \$2,500 was paid upon this note; that was collected from Marston's note, which reduced the debt to \$10,000. The Marston note was held as security for the \$12,500 note of the California National Bank together with the Dare-Havermale note. Our bank brought a suit against the California National Bank on this note. I made the arrangement on behalf of that loan in the first instance. At that time I was vice-president of the bank. The arrangement was consummated here. I was in San Diego some time in 272

273

274 April, 1891, and Mr. Collins with some other director, Mr. Norcross, I think, called on me and raised the question of getting some discount favors for the California National Bank, and spoke in a general way of the note that they could furnish. I then told them to address me a letter of such a date and when we got home we would finally pass upon it. I thought we would do it for them.

Q. Was anything said at that time, or any subsequent time, with reference to loaning this money to Mr. Dare, Havermale and other parties whose names were signed to that note?

275 Objected to on the grounds previously stated, and on the ground that no such conversation can be evidence in this case. Objection overruled. Exception to the defendant. (Objection on ground "that it is not mentioned in the proof of claim or bill of particulars, and that in no way could O'Brien's honesty or dishonesty be affected by a conversation had in Denver, not taken at time of examination of witness, and on the ground that no such conversation can be evidence in this case.")

276 A. Never; no, sir. It was an operation with the bank, pure and simple. It was agreed that our bank should make that discount for the California National Bank. The proceeds were put by our bank to the credit of the California National Bank and the proceeds were checked out by that bank. I do not know that this money was used for any other than bank purposes, and I do not know that it was so used.

Plaintiff's counsel reads from the deposition of--

JOHN P. ODELL, a witness on behalf of the plaintiff taken at Chicago, as follows:

My name is John P. Odell; I am of legal age and president of the Union National Bank of Chicago, Illinois. I reside at No. 403 North State street,

Chicago. I have been president of the Union National Bank of Chicago for about four years. 277

Q. State whether or not you recall a certain transaction in which your bank made a loan of \$20,000 on a note signed by S. G. Havermale, J. W. Collins and D. D. Dare, endorsed by the California National Bank, some time in March, 1891?

Objected by defendant's counsel on the grounds previously stated. Objection overruled and exception to defendant. (Objection on ground "that it is not mentioned in the proof of claim or bill of particulars, and that in no way could O'Brien's honesty or dishonesty be affected by a conversation had in Denver, not taken at time of examination of witness, and on the ground that no such conversation can be evidence in this case.") 278

A. I remember some such transaction as that; the loan was negotiated with the California National Bank by Mr. W. R. Stebbins and John W. Collins. Mr. Collins was president of the California National Bank of San Diego. The loan was negotiated here in this office with me (the Union National Bank). Mr. Stebbins made the initial negotiation; he was an old friend of mine.

Q. In what way was the loan made, by way of discount or otherwise?

Objected to on the grounds previously stated, and on the further grounds that it appears to have been made by Mr. Stebbins, who has nothing whatever to do with this company. Objection overruled and exception to the defendant. (Objection on the ground "that it is not mentioned in the proof of claim or bill of particulars, and that in no way could O'Brien's honesty or dishonesty be affected by a conversation had in Denver, not taken at time of examination of witness, and on the ground that no such conversation can be evidence in this case, and that 279

280 it appears to have been made by Mr. Stebbins, who has nothing whatever to do with this company.")

A. My recollection is that it was a discount of a note of Collins, Dare and Havermale, endorsed by the bank and collateralized by the stock of the First National Bank of Cheyenne and some other securities. I have forgotten what just now. Among the securities were some notes of a man named Spreckles, which were collateral for this note; a son of Carl Spreckels; John G., I think it is. The proceeds of this discount were placed to the credit of the California National Bank and checked out by the same in the regular course of business. I have
281 no knowledge of what became of the money after it was checked out.

Q. Do you recollect whether or not at the time the California National Bank closed in November, 1891, there was anything at your bank from the California National Bank?

Objected to on the grounds previously stated. Objection overruled and exception to the defendant. (Objection on ground "that it is not mentioned the proof of claim or bill of particulars, and that in no way could O'Brien's honesty or dishonesty be affected by a conversation had in Denver, and on the ground that no such conversation can be evidence in this case, and that
282 it appears to have been made by Mr. Stebbins, who has nothing whatever to do with this company, not taken at time of examination of witness.")

A. There was a balance still due us on that note. My understanding is that the loan was made by our bank to the California National Bank and not to the makers of the note. The note was endorsed California National Bank of San Diego; I forget whether it was endorsed by the president or by the cashier. The note was dated March 24, 1891, and was discounted on March 25, 1891.

CROSS-EXAMINATION by Mr. Willcox:

283

I cannot say that I saw the endorsement written on the back of the note at the time it was written. I could not say from recollection. My recollection is that it was by Collins, but I can state now only that it was endorsed by the bank.

Q. You have no clear recollection on the subject, have you? A. Only that it was endorsed by the bank.

Q. That it appeared to be endorsed by the bank, you mean. A. You can put that in any language you please.

Q. Is not that what you mean, Mr. Odell, that it appeared to be endorsed by the bank? A. Yes; I should say so.

284

Plaintiff's counsel offers in evidence a letter signed by George N. O'Brien to W. S. Woods, President, &c., dated April 11, 1891. (Signature of O'Brien to letter proved.)

Objected to as incompetent, immaterial and irrelevant, and prior to the date of the bond; as being merely a copy of a letter and not the best evidence, and there being no proof of the transmission of the original. Objection overruled and exception by defendant.

Marked Plaintiff's Exhibit "MM."

WILLIAM D. BLOODGOOD, sworn and examined as a witness for the plaintiff.

285

Questioned by Mr. Paige:

I reside in New York City and have ten years' experience in bookkeeping. The paper shown me is in my handwriting (paper marked for identification "NN.") I was employed by Mr. Pauly and examined the books and papers of the California National Bank, with a view to ascertaining the transactions of Mr. Collins with that bank. I was associated with Mr. A. A. Sparks of San Diego. We began the ex-

286 amination about the first of April, 1892, and completed it somewhere towards the end of May. We worked all the time constantly and worked hard.

Q. When did you discover the transactions of the 22d of September, 1891, and the 13th and 14th of October, 1891, and the 31st of October, 1891, which are detailed in that paper?

Objected to as incompetent, immaterial and irrelevant; that it is of no consequence when Mr. Bloodgood discovered this, and that it calls for his conclusion as to what constitutes a discovery. Objection overruled. Exception by defendant.

287 A. I discovered these items that you mentioned towards the end of May. There were others. Just those which you asked about. We discovered that credits to Mr. Collins' account were on the bank's guarantee and endorsement of the bank, and that the deposit tag was made up by George N. O'Brien, the cashier, so far as I can remember.

Questioned by the Court:

Q. When did you make this paper? A. Some time in May, 1892. At the time, as a result of my investigations.

By Mr. Paige:

288 Q. As soon as possible after the discovery of the facts? A. Yes, sir; I can state without this paper if it is needed.

The Witness: I gave this paper to Mr. Pauly and in that way communicated to him the facts in regard to the things that occurred on those four days, as stated in that paper, and in that way I communicated to him my discovery of those facts. That was the latter part of May. It must have been prior to the 23d of May, 1892. I cannot say that Mr. Pauly wrote the defendant on the 23d of May a letter, of which this paper shown me is a copy. I know that

he notified them at once after I gave him the statement. 289

Questioned by the Court:

I know that, because I was connected with him. I did not write the letter; I heard him dictate it.

Letter from Mr. Pauly of May 23, 1892, produced by defendant at plaintiff's request.

The Witness: That is a copy of the letter.

Letter offered in evidence and marked Plaintiff's Exhibit "O O."

We continued preparing and perfecting the details of those transactions and of the attendant transactions of Mr. Collins, and on the 28th day of May we prepared this paper. 290

Plaintiff's counsel produces proof of claim—so-called.

Marked for identification Exhibit "CC."

By Mr. Paige:

Q. Was that sent by Mr. Pauly to the defendant by mail on the 28th of May?

Mr. Strong: Do you know that of your own knowledge?

A. I can't answer from my own knowledge; no, sir. I know that these statements that I made up for the Surety Company at that time were mailed. That is all I can say. 291

Q. How do you know they were mailed? Did you mail them? A. I did not mail them; no, sir.

Q. How do you know they were mailed? A. I know it was put in the box to be mailed. It is not the chance that they are going to be taken out again.

Mr. Paige: May I ask Mr. Pauly the question whether he knows that was mailed on the 28th of May—of your own knowledge?

292 FREDERICK N. PAULY recalled:

Questioned by Mr. Paige:

I have no positive recollection about it.

EXAMINATION of Mr. BLOODGOOD continued by Mr. Paige:

Q What do you know about that paper being mailed? A. I cannot state at this time as to whether I put that in the post office myself, or whether it was put in by the young fellow employed to do that.

Questioned by the Court:

293 I drew that paper; yes, sir. I then gave it to Mr. Pauly and it was to go along with this proof of claim to the American Surety Company. After I handed it to Mr. Pauly I was always under the impression—— They are trying to make me say that is the exact paper that was mailed. I say the paper was mailed at that time. Whether that is the exact paper I cannot say. I remember seeing it at that time. I never saw it after I handed it to Mr. Pauly.

Questioned by Mr. Paige:

294 Yes, I remember distinctly that a paper was mailed at the time and on that day—these papers attached to this typewritten paper are mine. The ones I made to go out with this. Of course, I cannot state positively whether that is the paper. My best recollection is, that is a copy of it.

By Mr. Paige: I now offer it.

Questioned by Mr. Strong:

I never saw it after I handed it to Mr. Pauly. I am not able to state that it was or was not mailed except that it is the regular course of business. I cannot say that I know of my own knowledge

Frederick N. Pauly.

101

whether it was or was not mailed. I know they 295
were made up for the special purpose to be sent that
day and something did go.

Questioned by Mr. Paige:

In the regular course of business at our office the
mail would be made up and signed by Mr. Pauly
and put up by the clerk in the office and mailed.
After I had done my share of it, it was turned
over in that way. I had nothing more to do with
it. I only know Mr. Pauly said he mailed it. It is
so long ago it is almost impossible for me to remem-
ber—May, 1892.

296

FREDERICK N. PAULY recalled.

EXAMINED by Mr. Paige:

Q. Mr. Pauly, is that your letter-book? A. Yes;
it was taken from my letter-book.

Q. That is the enclosure, is it? A. I understand
it is.

Q. Were the letters contained in your letter-book
at that time mailed as prepared and dated? A. The
letters directed to the American Surety Company, of
which I have copies in my letter-book, were mailed
by direction upon the days of their respective
dates.

297

CROSS-EXAMINATION by Mr. Strong:

I do not remember that I mailed any of them my-
self. I did not go to the post office with anybody
who did mail them and I have no personal knowl-
edge whether they were mailed or not.

Questioned by Mr. Paige:

There was no United States letter-box in my office.
There was one near there. I saw that the letters
were mailed every day.

298 By a Juror:

Where was the letter box? A. The post office was in the same block, less than 200 feet away.

By Mr. Strong:

Q. You don't take back what you have said, that you neither mailed them yourself nor went with anyone to mail them, and did not see them mailed. You don't take that back? A. I don't take back anything that I said.

Questioned by the Court:

299 I did not see these letters mailed; I directed them to be mailed. I do not remember who I directed to mail them. There were two or three employees in the bank. I have no special recollection of directing these particular letters to be mailed. There were regular times during the day for the mailing of letters in my office. I cannot say just what these times were now. I don't remember whether it was at the close of the day or just prior to the going out of the mail. There was no mail box in my office. All I remember about it is that I always directed my letters to be mailed, and I suppose I did so in this case. That is all there is of it.

Questioned by Mr. Paige:

300 There was a letter box in my office; there was a box in which letters were deposited for the mail. I cannot say that I saw somebody start with the mail at the close of business every day.

Q. And that was the usual course of business that somebody did start? A. That was the usual course to see that the mail box was empty for the purpose of mailing.

Q. That the mail box was empty the next morning, and you directed your subordinates to carry the mail from the box to the post office every day? A. That was the direction.

William D. Bloodgood.

103

WILLIAM D. BLOODGOOD, recalled:

301

Plaintiff's counsel offers in evidence a letter written by the American Surety Company to Frederick N. Pauly, Receiver, dated May 31, 1892.

Marked Plaintiff's Exhibit "QQ."

DIRECT EXAMINATION by Mr. Paige.

Paper dated June 15, 1892, purporting to be a further statement of account of George N. O'Brien, marked for identification "RR," shown witness.

I prepared all except the typewritten part of it, and it was completed on the day it bears date, and prepared to be mailed to the American Surety Company. All I can say as to the mailing is the same as I have already stated as to the other, that it ought to have been mailed and was mailed. The mail was all prepared in the regular course of business and put in this box to be sent to the post office by the boy, and that naturally would be in it. The boy would take them to the post office each day. The box would be empty every night before I left there. I did not prepare this letter dated 31st of May, 1892, to the American Surety Company by Frederick N. Pauly. I presume Mr. Pauly prepared it. 302

Mr. Paige to Defendant's Counsel: Have you got that letter? 303

Mr. Willcox: We have a letter of the 31st of May, 1892.

Questioned by Mr. Strong:

The paper marked RR for identification was prepared by me and handed to Mr. Pauly and it was never in my possession again that I remember. I have no knowledge as to what he did with it, only I know he kept hurrying me up with it. I am

304 anxious to tell you that fact in this case. I have no personal knowledge as to what he did with it.

Questioned by Mr. Paige:

I have personal knowledge of this letter of May 31, 1892, and this paper marked "RR" for identification; of the fact that they were prepared for mailing.

By Mr. Strong:

Q. What do you mean by prepared for the mail?

A. I remember Mr. Pauly telling me to make up a statement, to go off in the mail.

Q. And that is all you know about it, isn't it? A.
305 Yes, sir.

By Mr. Paige:

Q. Do you remember that it was put in an envelope and prepared for the mail? A. No, sir.

Plaintiff's counsel reads in evidence letter of June 24th from Mr. Pauly to the American Surety Company.

Marked Plaintiff's Exhibit "SS."

Plaintiff's counsel reads the enclosure in the above, being a notice dated June 24th.

Marked Plaintiff's Exhibit "TT."

Plaintiff's counsel reads in evidence affidavit.
306

Marked Plaintiff's Exhibit "UU."

Exhibit "NN" for identification shown witness.

The note "Geo." written in pencil against certain items on the margin of the paper, marked "NN" for identification, means that these entries referred to George O'Brien. They were put on after the paper had been prepared, but how long after I cannot say.

The Court: I don't understand what you are asking about.

Mr. Paige: That paper contains facts both as to Collins and O'Brien, and he has marked on the margin "Geo." opposite the ones that were selected to make up the O'Brien matters. 307

The Witness: There was more delay in preparing the formal statement on the O'Brien matters than on the Collins matters because they were undecided upon O'Brien and they were inclined to push the matter only about Collins.

By Mr. Strong:

Q. Did you consult with your counsel yourself? A. The instructions came from Mr. Allen to me direct, when he was in the bank, as to what to do. 308

By Mr. Paige:

Q. How much time did it take to consult your counsel intermediate the time that you prepared that paper and the time that you prepared the paper on the 18th of June? A. Sending these back and forth between Los Angeles and San Diego, it would take considerable time. Sometimes it would take as long as a week before we would get an answer back. I cannot remember as to this particular matter. There was such a delay, and sometimes it was as much as a week.

Plaintiff's counsel reads in evidence the letter of July 8th from defendant to Mr. Pauly. 309
Marked Plaintiff's Exhibit "VV."

Also the letter of Mr. Pauly to defendant of July 18th.

Marked Plaintiff's Exhibit "WW."

Mr. Paige requests the enclosures referred to in said letter. Mr. Willcox produces only a list of property, being one of such enclosures; it is marked Plaintiff's Exhibit "XX."

Plaintiff's counsel reads letter of July 26th from defendant to Mr. Pauly.

Marked Plaintiff's Exhibit "YY."

- 310 Also Mr. Pauly's reply, dated August 1st.
Marked Plaintiff's Exhibit "ZZ."
Also defendant's reply, dated August 8th.
Marked Plaintiff's Exhibit A1.
Also letter from Mr. Pauly, dated September 6th.
Marked Plaintiff's Exhibit B1.
Also letter from defendant to Mr. Pauly, dated September 14th.
Marked Plaintiff's Exhibit C1.
Also letter from Mr. Pauly to defendant, dated September 21st.
Marked Plaintiff's Exhibit D1.
- 311 Also letter from defendant to Mr. Pauly, dated September 28th.
Marked Plaintiff's Exhibit E1.
Also letter from Mr. Pauly to defendant, dated October 4th.
Marked Plaintiff's Exhibit F1.

Questioned by Mr. Paige:

- 312 We did not delay any time waiting for Mr. Bradbury Williams, that I know of, in regard to investigating the books, and I cannot remember that we delayed in sending the reports to the American Surety Company. Mr. Pauly, the Receiver, took possession of the banking house and its contents December 29, 1891. I remember a demand made by Mr. O'Brien for his salary.

Q. And what did Mr. Pauly respond?

Objected to as incompetent, immaterial and irrelevant; that Mr. O'Brien's conversations with Mr. Pauly at that time are in no way binding upon his surety, and Mr. O'Brien's acts at that time are in no way binding upon his surety. Objection overruled. Exception by defendant.

A. He said he did not see his way clear to pay it on account of Mr. O'Brien owing the bank. He said

he would have to endorse it on his indebtedness or 313
note or something of that kind. Mr. O'Brien left, I
think, that day or the next. As near as I can re-
member, about the first of March, 1892. The ex-
pert and myself made up the amount of the
indebtedness of Mr. Collins to the California Na-
tional Bank as the result of the investigations
which I have testified we made.

Q. As the result of the investigation you have
testified you made, did you make up the amount of
Mr. Collins' indebtedness to the California National
Bank? A. The expert and myself made it up, yes.
It was in the neighborhood of \$374,000. We made
it up as of several dates, May 28, 1892, being one of
such dates.

314

Questioned by Mr. Paige:

There were two transactions on the 13th and 14th
of October, if I understand aright. There appears
on the books to the credit of Mr. Collins an item of
\$20,000, and also an item of \$24,500, and another
one of \$500. This money was placed to the credit
of Collins' personal account, and from the facts
found upon investigation it showed a credit of
\$20,000, one item, and \$24,500 another, and \$500
another. The deposit slips in my hand show the
same thing, that John W. Collins was credited
\$24,500, money obtained from the United States
National Bank of New York, and \$500 additional 315
on the 14th.

Questioned by the Court:

The deposit slip of October 13th, which pur-
ports to be a deposit or draft, or something
else, of the United States National Bank of
New York for \$24,500, is in the handwriting
of the cashier. The deposit slip for \$20,000
is in the same package. It is also in the
handwriting of the cashier, O'Brien, and it pur-
ports to show that by a draft on the Western

- 316 National Bank, or something equivalent to that, Collins deposited \$20,000. That is the effect of these two slips.

Questioned by Mr. Paige:

The \$500 slip which I have here is in the handwriting of George N. O'Brien, cashier of the bank. I have been teller of the Merchants' National Bank of San Diego since this transaction.

Questioned by the Court:

- 317 Neither of these items purports to represent the deposit of money or a draft, but they purport to represent telegraphic dispatches. According to this deposit tag it represented a telegraphic dispatch that he had deposited this money in the United States National Bank, or obtained the money in New York.

Questioned by Mr. Paige:

- 318 If a deposit had been made in the United States National Bank, upon its books to the credit of the California National Bank, and had been obtained upon bank collateral, the proper entry should have been to have credited the money to bills payable on the books of the California National Bank and debited the United States National Bank of New York. There were no such entries upon the books of the California National Bank, and only a charge to the United States National Bank and a credit to Mr. Collins individually. Whereas, if a credit had been obtained in the United States National Bank on a note of the California National Bank, the proper entry would have been a charge to the United States National Bank and a credit to the bills payable. If it was on a discount of the bank, it would have been credited to rediscount and not to J. W. Collins. The other item is a deposit tag for \$20,000, showing that this \$20,000 was placed to the credit of J. W. Collins on October 13th by a telegraphic dispatch. This money, if obtained upon a note of the bank, should

have been placed to the credit of bills payable. This 319
 slip shows that the money came from the Western
 National Bank. It should have been placed to
 credit of bills payable and charged to the Western
 National Bank. The actual entries are: The West-
 ern National is charged with \$20,000, and the ac-
 count of J. W. Collins is credited with \$20,000, and
 bills payable is not credited with \$20,000. This slip
 for \$500 is the balance of that \$25,000 obtained from
 the United States National, and it so shows on the
 slip. As to the transaction on the 31st of October,
 J. W. Collins was credited \$20,000 upon a tele-
 graphic dispatch from Denver, and the First Na-
 tional Bank of Chicago was charged \$10,000, and
 the Western National Bank of New York was 320
 charged \$10,000. Of course, as to this, it was got-
 ten on New York, as far as I could find out.

By the Court:

Q. What does the tag show? A. The tag shows
 a credit to J. W. Collins of the 31st of October, 1891,
 for \$20,000; from the First National Bank of Chi-
 cago \$10,000, and the Western National Bank of
 New York \$10,000.

By Mr. Paige:

Q. What does it show about the telegram? A.
 That the telegram came from Mr. Collins.

Mr. Strong: I object to that. Let us have the 321
 telegram.

By the Court:

Q. Are those deposit slips in the handwriting of
 Cashier O'Brien? A. Yes, sir.

By Mr. Paige:

Q. From what source did that credit come? A.
 The tag shows a telegram—a despatch.

322 Q. Is that the telegram? (Showing witness paper.)

Objected to.

By Mr. Strong:

Q. Do you know personally if that is the telegram referred to? A. I don't know personally; no, sir.

By Mr. Paige:

Q. I show you a telegram. From whom does it purport to be sent and to whom?

323 Objected to on the ground that the telegram is the best evidence.

The Court: You must identify this telegram in some way as one sent by Mr. Collins to O'Brien.

By Mr. Paige:

Q. Where did you first see that telegram? A. When I first saw it, it was in the private drawer of J. W. Collins. In the bank files They had a file for filing letters and telegrams, and they had one file, a case, under the personal name of J. W. Collins, and these telegrams were all found, at least I found them there, and I picked them out of there.

Questioned by the Court:

324 That file comprises telegrams from Collins to the bank or any personal letters signed by him. All personal letters by Collins to the bank. I don't remember what period of time it extended over; I believe it was from the first of January, 1891. The file was kept in the bank alongside of the vault. Collins' private drawer was in one of these files. They were arranged alphabetically and each one has a drawer. The letters under A were filed in one drawer by itself, and under B; and they also had them for each bank; letters from the United States National Bank in one drawer and also J. W. Col-

lins. When I say it was Mr. Collins' drawer, I mean it was the drawer assigned to correspondence from Collins—supposed to be his private letters. 325

The telegram referred to is marked for identification Exhibit G1.

The Witness: The telegram purports to be in cipher; I can only read it as it has been translated here; the cipher has not been communicated to me. I cannot at this present time read this cipher. I had it there at the bank. I do not know how to read that cipher only by looking it up from this telegram. At that time it was translated. It corresponded at that time with the translation. I do not believe we have the translation. There is one word here that I cannot remember. I can remember the rest. 326

Plaintiff's counsel offers telegram in evidence and asks witness to translate it.

Objected to as incompetent, immaterial and irrelevant.

The Court: I don't think this defendant can be bound by a telegram which has been found among the papers of the bank without further identification. I will exclude it.

The books of the bank show a credit to Mr. Collins of \$20,000, and a corresponding charge to the First National Bank of Chicago, \$10,000, and the Western National Bank of New York, \$10,000. There was one subsequent transaction in regard to those matters. In the Collins account there was an entry charging J. W. Collins \$10,000, and crediting the National Bank of New York \$10,000 back again. This paper shown me is a deposit tag of the California National Bank, dated April 21, 1891. 327

Q. What does it show?

Same objection as made to all the prior transactions. Same ruling and exception.

328 A. Showing that the account of J. W. Collins is credited \$20,000 by National Bank of Kansas City, letter 4/11.

Q. In whose handwriting is that? A. George N. O'Brien.

The books show in regard to this transaction that the National Bank of Kansas City is charged \$20,000, and J. W. Collins' personal account credited \$20,000. The letter now shown me came from the letter book of the California National Bank; it is dated April 11, 1891, written by George N. O'Brien, cashier, to W. S. Wood, president of the National Bank of Commerce of Kansas City. The letter is already in evidence. There is not any other entry in
329 regard to that transaction on the books of the California National Bank. There is no entry upon the item of bills payable.

The Witness: There were no subsequent entries made in regard to that transaction in the account of the Kansas City Bank. I believe it stands upon the books of the California National as a debit to the Kansas City Bank to this day. I could tell by looking at the books. (Witness examines books.) I find when the bank closed the entry had not been corrected, and had not been charged back, had not been credited to the National Bank of Commerce. The books show a number of entries here from the time that first charge was made. I am now reading
330 from the account of the Bank of Kansas City. The books show all the time a balance in favor of the California National Bank on the books of the Kansas City Bank of about \$20,000—a little short of \$20,000—\$86.80 short. (Showing witness check of J. W. Collins of \$19,500 already in evidence that witness Brimball testified he found among cash items.) The teller's book shows cash carried by the teller, \$86,198.54, consisting of, according to the books, \$45,200, bank bills in the vault; \$981, bank bills; \$20,000, gold; \$9,480, gold; \$10.75, fractional currency; \$342.52, silver coin; \$96, nickels and pennies; \$25, ten cents, nickels and pennies; \$5,937.30,

checks and other cash items; \$2,461.60, Mexican 331
dollars. All I can say is, as to the actual cash item,
what we found is what represented the cash that
was turned over by the National Bank Examiner.

Questioned by Mr. Strong:

All I know as to this matter is that certain papers
were turned over to us by the Examiner. He says
they were found that day.

Questioned by the Court:

The certificates of deposit of September 22, 1891,
have never been entered upon the books. It is sup-
posed that on September 22, these two certificates 332
certified by O'Brien, were delivered to Collins. They
were used. The bank did not pay them. They
came back into the Receiver's hands. The Receiver
has them in his possession filed with his claims.

The Court: What is the evidence about the dispo-
sition of these certificates?

Mr. Paige: He sold them in New York and got
the money for them.

One of them is the Western National Bank and
the other is the First National Bank of Omaha.

The Court: There is evidence about the \$7,500 and
none about the \$8,500.

Mr. Strong: Your Honor is right.

Questioned by Mr. Paige:

333

The paper shown me is the certificate attached to
this claim. When I first saw it, it came through
the Consolidated National Bank of San Diego, a
proof of claim, and later it was settled. To my
knowledge I do not know. It was presented by the
Consolidated National Bank of San Diego, with
proof of claim to have it proved. I cannot say
whether Mr. Pauly has paid any dividends upon it.
The ledger account shows that all these items that
went to the credit account of Collins were drawn
upon and used by him.

334 Questioned by the Court:

Q. Now, take the Western National Bank of New York; what does the deposit slip of October 31 purport to represent? A. It represents that \$10,000 had been deposited in the Western National Bank of New York to the credit of the California National Bank, or J. W. Collins.

335 The California National Bank had a regular account with the Western National Bank of New York. I have the account here in the books. The entries in that account, with reference to this \$10,000 item, are October 31, to remittance from Denver, \$10,000; that is a charge to the Western National as of October 31. There is nothing upon the books of the California National Bank to really show that the money was not deposited. There is a credit here to correct that entry. The deposit slip shows that no money was deposited.

By the Court: The Western National transmitted monthly statements to the San Diego Bank, and those statements would show if there was no credit of such an item placed to the credit of Collins' account.

Mr. Mitchell: Yes, and Mr. Smith of the Western National has so testified that they gave no credit at any time to Collins.

336 The Court: That is so in the testimony, but I am trying to find out how the cashier is to know.

That covers the whole month of October, and shows that there was no item of \$10,000 placed to the credit of the California National Bank on that day. There is another \$10,000 item during the month, but then it mentions from where it came, the National Bank of Commerce on the 19th of October. The reconciliation of the account shows at the bottom of the statement as \$10,000. The bookkeeper of the California National Bank has to reconcile these statements, and he makes notations on the bottom of the statement, showing any debits

or credits which did not correspond with these 337
books. There is one on this.

Mr. Willcox: Immediately after this statement is received in San Diego it is checked up, and it is found that there is a discrepancy in that respect, and immediately it is corrected on the books of the bank and charged back against Collins, and it shows it is an error, and it is straightened right out on the face of the book.

The Court: How is that?

The Witness: I have just stated that there was an entry made on the 19th of November correcting that charge.

The Court: Now, is there not a charge against 338
Mr. Collins on that day against that item?

The Witness: Yes, I said so a little while ago.

The Court: That seems to end that.

Mr. Paige: Yes, that ends that.

The Court: I don't see that that item is in the case any longer.

Mr. Paige: No, sir; it is not.

The Court: Consider that out.

Mr. Paige: Yes.

The Court: Now, I would like to know what item is in the case except the \$7,500 certificate of deposit.

Mr. Paige: The items of the 13th and 14th of October.

Questioned by Mr. Paige:

339

Q. Turn to the account of the First National Bank of Chicago. Following the transaction of the 31st of October, the book shows the debit to the Chicago Bank, the ledger account of \$10,000, and that \$10,000 remains there undrawn out at the end of the account; so that if that book is correct Mr. Pauly ought to have to his credit \$10,000 on the books of the Chicago Bank now. Is that correct?

A. Yes, sir. There ought to be another entry made there.

340 Questioned by the Court:

The deposit tag shows a despatch on the 30th from Denver, charging the First National Bank of Chicago with \$10,000 and the Western National Bank of New York \$10,000, and he makes up a deposit tag and credits that to J. W. Collins. If it was a bond, of course, he would credit it to his personal account. If it had been upon bank paper, it would have gone to bills payable.

Questioned by Mr. Strong:

341 There is nothing on the telegrams or books of the bank that shows there is anything wrong in making the credit to Mr. Collins, or that shows that O'Brien was dishonest or fraudulent, or that he knew it to be wrong to give that credit to Mr. Collins.

Questioned by the Court:

The cashier acted, I say, upon a telegram from Mr. Collins, advising him that Collins had placed to the credit of the California National Bank with the Chicago Bank, \$10,000. There is nothing on the face of the slip made out by Mr. O'Brien, the cashier, which is inconsistent with that state of facts. It would show the same as the other transaction.

342 Questioned by Mr. Paige:

The statement shown me is the statement that was given me by the National Bank Examiner as the last monthly statement of the First National Bank of Chicago, covering from November 1 to 12, 1891.

Same marked Plaintiff's Exhibit I1.

I don't know when it came to the bank or when Mr. O'Brien first saw it. It shows the notation and the reconciliation of the account on that statement from the 1st of November to the 12th. That item

never was charged back like the other one. It still 343
remained in this condition until I made the correct-
ing entry. I have not seen the statement. They
have not the statement here. This is the statement
from the 1st to the 12th of November. They recon-
cile that account and they show right there that the
\$10,000 did not correspond with the statement ren-
dered by the First National Bank. That statement
shows it.

Questioned by Mr. Willcox:

That handwriting is Harry O'Brien's.

Q. Not George O'Brien's? A. No, sir.

CROSS-EXAMINATION by Mr. Willcox:

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The deposit tag shows that that \$10,000 credited
to the First National Bank of Chicago was obtained
by Mr. Collins. I did not learn from examination
of the books that that \$10,000 credit was the result
of a discount by that bank for Mr. Collins of a pri-
vate note for Mr. Collins for that amount, a note
made by Mr. Beard of Cheyenne. I know that on
the 2d of November the California National Bank of
San Diego drew drafts on the First National of
Chicago, aggregating \$10,000, and those drafts
were paid.

By the Court:

Q. You understand that the San Diego Bank really 345
got this \$10,000? A. They overdrew their account
with the First National Bank of Chicago by the
First National paying that \$10,000.

By Mr. Willcox:

Q. They got the money?

Mr. Mitchell: If they had not got the money
Collins could not have drawn it out.

A. They got the money, yes. I first entered
the employ of Mr. Pauly on the 8th day of Jan-

- 346 uary, 1892, and continued in his employ until about the 10th of April, 1893. I was in San Diego when the National Bank Examiner took charge of the bank. Mr. Collins and Mr. O'Brien both lived there then. Immediately upon entering the employment of Mr. Pauly I commenced work for him. That was in the month of January, 1892. I looked after Mr. Pauly's affairs and helped him make up his report to the Comptroller of the Currency. This necessitated going over all the assets and placing the value of the same and making up such report—that is about all. I do not remember whether it necessitated an examination of the books. There was a statement given to Mr. Pauly by the
- 347 Bank Examiner showing accounts that ought to be made to correct the books, and in giving his report to the Comptroller, and stating over-certificates of deposit, &c.; and over-issues of stock, he simply checked that up. I checked that up in the books. That report made by the Bank Examiner to the Comptroller which preceded Mr. Pauly's coming into possession was not copied in the books of the bank. I do not know that we had a copy of it. The Examiner gave a detailed copy; it was not in the books; it was on loose sheets. I believe that was retained. I do not believe I have seen it since the first time he was making up his report. Mr. Pauly and I went over it together in the month of January.
- 348 Mr. Pauly was making up his report to the Comptroller. There was a statement in that report as to making correcting entries—not necessarily in the account of Mr. Collins. Mr. Chamberlain, the National Bank Examiner, said: "I don't know whether it is Dare & Collins, or Collins. You will have to go through that thing and find out." These items were not discussed between Mr. Pauly and myself only in a general way, Mr. Pauly telling me to check up that list and see whether it corresponded. We didn't know anything about it. As far as I can remember, he simply asked me to take that statement; that the National Bank Examiner

said to make correcting entries; to correct the book 349
and to check up these certificates of deposit and
see what the stubs of the certificate of deposit book
showed; to look in the other books to see if the
money went through; that they were paid. I
simply did it in that way, not knowing anything
about it, but simply checked it up to see if it corres-
ponded with the National Bank Examiner's table,
so that Mr. Pauly could get it in his report. Some
of the items other than the certificates of deposit
were just in the same way. I had no way of going
through the books to find out of my own knowl-
edge at that time. I simply took that statement
and found that these items claimed in the statement,
some of them, were credited to Collins, but I can- 350
not remember the whole statement now. I checked
up the \$25,000 item, United States National Bank
with the Western National account, as contained in
that report by Mr. Pauly made. I want to say
why I answered in that way. I was thinking of
the checking up of the accounts of the United States
National Bank. That I checked up afterwards, to
show how their balance tallied with ours. That is
what I thought you were asking me. I took that
statement, if I can remember, and looked over the
account of Collins to see if any of those amounts
were credited to his account. That is all the check-
ing I did as far as that statement goes. I did not
check them on that statement with the accounts of 351
the bank. I did on the statement of the United
States National Bank in checking that up.

Q. Then you did check up the items contained in
that report with Mr. Collins' account? You have
just said so? A. Yes; to find out whether these had
been placed to his credit.

Q. And you did that before the report was sent
to the Comptroller by Mr. Pauly? A. Yes, sir.

Q. And you then found out that Mr. Collins had
been credited with these items, did you not? A.
Yes, sir.

- 352 Q. And that was in the month of January, 1892?
- A. Yes, sir. I checked up Mr. Collins' account to find out if he had been credited with these items, because the National Bank Examiner made this statement, to correct the books, and on this statement he said: "Charge Collins and credit United States National Bank," and I took that statement to see whether the amounts had been placed to the credit of Collins. There was no suspicion in my mind that those ought to have been charged to Collins. I did not know anything about it at that time. Nothing at all was said about it between Mr. Pauly and myself; simply to check it up. I did not know anything about it when I went in the
- 353 bank. Mr. Chamberlain did not say anything to me about it. I could not get anything out of Mr. Chamberlain. Mr. Chamberlain told me to make those entries to correct the book, and I have some of the first papers where he started himself.

Questioned by the Court:

The cashier, O'Brien, was retained in the service of the Receiver until about the 1st of March, and up to that time there had been no discussion that I know of between the Receiver and any of the bank officials about any dishonesty of Cashier O'Brien.

- 354 The Court: They would not suppose he was guilty of those frauds. There is no use of going back to that time. I suppose it was known that there had been irregularities and perhaps frauds in the management of the bank, but it was not supposed that the cashier knew anything about it until long after the time he was discharged.

Questioned by Mr. Willcox:

I was familiar with a great deal of what Mr. Pauly did in the performance of his duties as Receiver. I knew of the receipt by him of proofs of claims as they came in. I acknowledged the ma-

William D. Bloodgood.

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jority of them. I remember one coming in from the Western National Bank. 355

Questioned by the Court:

I had no idea that the cashier had been guilty of dishonesty or fraud until the United States Attorney said that by making these entries he committed a fraud. That is the first I knew of it. I did not know of my own knowledge that making those entries made it fraud on his part. I think that I first learned that he made these entries improperly along in May, because the United States Attorney kept pushing us in order to get evidence for the Grand Jury. That was the first I knew of it.

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Questioned by Mr. Willcox:

I discovered in January that these entries had been made by reason of deposit tags in January when I checked up the account of Mr. Collins, but I did not know that they were a fraud on the part of the cashier. I knew he made the entries, but I knew nothing about them. I had the slips in my possession in January, 1892, when I checked up the account. I checked up those according to that statement of the National Bank Examiner. There is nothing in the statement as to deposit tags.

Questioned by the Court:

357

I do not mean to say that I have seen and examined the deposit tags which referred to these transactions of October 13th and 14th and October 31st in January. I took that statement and checked his account from that statement.

Questioned by Mr. Willcox:

I was misled. I may have said that I had those slips before me when I made up this statement, but I did not understand the question right. I was examined under oath on the first trial of this case, and

358 I was sworn to tell the truth. As near as I can recollect I commenced the examination of Mr. Collins' account in the neighborhood of the first of April—to go through the entire account. As far as I can recollect it was about the first of April. That is my best recollection. The time has gone so it is almost impossible for me to remember. My memory is not any better now than on the first trial of this case on that subject.

Q. I read on page 4: "When did you commence the examination of the books of the plaintiff bank? A. Some time in February." Was that true? A. It depends upon what kind of an examination it was.

359 Q. You were then sworn to tell the truth as you have been here now. Do you recollect that question? A. No, sir; I do not.

Q. I show you the record. Does that refresh your memory? A. It might, but, as I say, I have been occupied by other business for the last two years, and it is hard work for me.

By the Court:

Q. What do you think about it now? Was it the first of February or the first of April? A. In February I might have gone through and checked up. I remember checking up a certificate of deposit account, to compare it with that statement.

360 By Mr. Willcox:

Q. I will read you another question: "Q. But you did become engaged in the examination of the books, and were engaged by Mr. Pauly to examine the books, and aid in the examination of the books? A. To aid in the examination of the books." Do you recollect that question and that answer? A. I don't recollect it, but I take it it is all right.

Q. Have you any doubt but what that is all right? A. No, sir; I have not.

Q. Would seeing your testimony refresh your memory? A. No.

Q. "Q. How long were you in the employment, in assisting that expert? A. I was about four months." Do you recollect that? A. No, I do not. It must be so, though. Mr. A. A. Sparks was the expert with me. He lived in San Diego, and I last saw him there. While I was engaged in examining the books, Mr. O'Brien was in San Diego. Mr. Collins was not there all of the time. When I first went with the Receiver, Mr. Collins was there. In commencing the checking up part of the examination of the books he was there. What I mean to convey is this: that it was on the account of J. W. Collins, and not on the general examination of the books of the bank. Mr. Collins was not there helping me while I was examining the books. Mr. O'Brien was there looking over the general books of the bank. Mr. Collins was in San Diego all the time I was examining the general books of the bank, but not personal account. All the examination of the general books of the bank that was made was the checking up of that statement. Mr. Collins was there as far as that examination went. Mr. Collins died on the 3d of March, 1892. I remember that Mr. Pauly one day went up to Los Angeles to make complaint against Collins, but I do not remember Mr. Pauly coming back with a warrant for Collins' arrest. I recollect, however, that Mr. Collins was arrested prior to the 3d of March as the result. I never knew what the complaint was. Mr. Pauly never told me. I knew from the daily papers at that time what the complaint was. I claim to be a thorough bookkeeper, a practical bookkeeper. If you mean an expert, I do not do that for a living. I claim to be a practical bookkeeper, nothing more. As a bookkeeper, I should say that if Mr. Collins procured the United States National Bank of New York to credit the California National Bank on its books with \$25,000, by reason of the discount of his personal note, I would give credit for that money on the books of the California National Bank to Mr. Collins, and that is just what Mr. O'Brien did ap-

364 parently; and I make a similar answer to a similar question put relative to the Western National Bank and to the First National Bank of Chicago. I was examined as a witness in San Diego in 1893, on behalf of Mr. Pauly, in an action wherein the Equitable Life Insurance Company of New York was defendant, before A. H. Sweet, United States Commissioner, and on that occasion I was sworn to tell the truth, and I did tell the truth.

Q. I read you this question: "Q. Go right on with Collins' account and state the condition of it so far as you know? A. Well, as I said before, the second of May J. W. Collins was given credit for \$40,000 by a deposit tag made up for that amount.

365 Q. What other item was there? A. On the 25th of March \$20,000." Do you recollect those questions and answers? A. Yes, sir.

Q. "Q. What year was that? A. 1891; that was obtained from the Third National Bank of Chicago, the amount being obtained on a note of Dare, Collins and Havermale." Do you recollect that? A. Not as to the Third National; no, sir.

Q. "Q. Did you discover any other irregularities of Mr. Collins? A. No, sir." Was that true? A. On that day, does it mean?

Q. It does not fix the date. It covers the entire account of Mr. Collins? A. I don't remember that; no, sir. It does not state there anything further about it, because I remember going into it more in detail than that. I do not recollect as to saying there were no further irregularities. The testimony given at that time was supposed to be true; but I do not see how I could make any such answer as that, when I knew different.

(Original deposition shown witness). That is all right. I acknowledge that deposition.

Mr. Wilcox: And I now show you that part of it where you so testified, and I ask you to read it at lines 14 and 15? A. Had not we been through any more of those items prior to that?

Mr. Willcox: Apparently not. A. I don't under-

stand it myself. There must be an error in some way, because I could not possibly make any such answer as that, I know. I then had before me an abstract of the account of J. W. Collins. I had exactly, as I always had, these same entries, and I don't see how my answer could have gotten down in that way, because I had them all before me. I testified concerning the payment by Mr. Collins of large sums of money, but I don't think for the benefit of the bank. 367

Q. "Q. State, if you can, whether Collins paid out any of the moneys for the use of the bank? A. Yes, sir." Do you remember that question? A. No, sir.

Q. Just take the testimony and turn to page 204 and you can follow me—lines 11 and 12. Do you find that question and that answer contained in the original testimony by you then given? A. Yes, sir. 368

Q. "Q. State how much and in what particular cases? A. On the 10th of November, 1891, they paid \$20,000." Do you find that question and answer? A. Yes, sir.

Q. "Q. Whom did that go to? A. They took up that note of bills payable \$20,000." Do you find that question and answer? A. Yes, sir.

Q. "Q. Who held the bills? A. I think it was the National Park Bank, a \$20,000 note; on the 9th of November they charged him with \$11,250." Do you find that? A. Yes, sir.

Q. "Q. How much? A. \$11,250. This settled the indebtedness due the Hanover National Bank of New York." A. Do you want me to explain why these were made? 369

Q. I want to know whether you find that question and answer? A. Yes, sir.

Q. "Q. Due from this bank to the Hanover Bank?" A. Yes, sir.

Q. What else do you find? "A. Also on October 30th, \$11,000 paid to the National Park Bank. Q. Do you find anything else? A. October 23d paid

370 the Bank of California \$20,000." Do you find those questions and answers? A. Yes, sir.

Q. "Q. Was that on the liabilities of the bank? A. Yes, sir." Do you find that question and answer? A. Yes, sir.

"Q. Is there anything else? A. October 16th, Pacific Bank, \$5,000; October 12, Pacific Bank, \$5,000; September 20th, Pacific Bank, \$5,000; September 2d, National Bank of Republic, New York, \$4,000; July 11th, Union National Bank, \$20,000." Do you find those questions and answers? A. Yes, sir. I know it is quite customary for banks to carry checks as cash. If paper of the California National Bank had been rediscounted for Mr. Collins, the
371 proper place to credit would be rediscounts. There is such an account in the books of the California National Bank. I have it here now. I find three entries made to the credit of that account by the bookkeeper of the bank and two by me. During the life of the bank, apparently, the only entries made in this account were three credits and three debits. The date of the first credit is July 8, 1890, and of the last August 7, 1890. The date of the first debit is September 22, 1890, and the last December 10, 1890. I find an account in the books of the bank of bills payable. During the life of the bank one credit was made to that account, no debits were made. There is a credit there made by Henry
372 O'Brien to the National Park Bank of \$20,000. That is the only entry. That account was not debited during the life of the bank with the \$20,000 that was paid to the Park Bank by Mr. Collins, to which I have testified. There were some bills rediscounted by the California National Bank, but not very many. Those that I speak of, those few of the United States National Bank, went to the credit of J. W. Collins. All of the bills rediscounted by the California National Bank, of which I have any knowledge, appear from the books to have been entered in Mr. Collins' account. All of the bills payable, and items of that class, also appear to have

been entered in Mr. Collins' account, except the one 373
to which I have called attention. The teller's cash
book shows all checks and deposits paid out and re-
ceived on certain days, all drafts on different banks
and all bank debits and credits and certificates of
deposit. If a party comes in to make a deposit and
takes out a certificate of deposit, we would credit
that to the certificate of deposit account and cash
would appear in the teller's book. The certificate
would not, only a memorandum and the number of
it, and what the cash was for and where it came
from—from the deposit. There was in the books a
certificate of deposit account.

REDIRECT-EXAMINATION by Mr. Paige:

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The examination made by me in January and
February was simply on that statement given me by
the National Bank Examiner to correct the books. It
did not extend to any more than the general books
of the bank, and not to the investigation of any par-
ticular account. The list of certification was veri-
fied just to check up those certificates of deposit that
the statement of the Bank Examiner called for to be
charged back to Collins, and was made simply to see
whether the list he had made agreed with the stub-
book as to outstanding certificates. I cannot tell
whether the paper now shown me is the account or
a copy of it, which was contained in the letter of
July 18th, unless I see it. I made up a copy ex- 375
actly like that to be sent to the Surety Company,
but as to the exact date I cannot say. I can iden-
tify it as the one described in the letter of July
18th.

Questioned by Mr. Strong.

I do not remember exactly the date when I made
it up. After making it I gave it to Mr. Pauly, and
I never saw it again. I do not know what he did
with it, only what he said, unless what I gave it to

376 him for, to be sent to the Surety Company. I only know what he told me about it; that is all.

Plaintiff's counsel offers statement referred to in evidence.

Objected to that it has not been shown to have been sent to defendant.

Objection overruled. Defendant excepts.

Marked Plaintiff's Exhibit J1.

Questioned by the Court:

Q. Who wrote the letter of July 18th; did you write it or the Receiver? A. The Receiver wrote it.

377

The Court: Call the Receiver and show by him.

Mr. Paige: The description corresponds. It shows exactly what their letter says it does. It is an account of J. W. Collins, showing a balance of, whatever it is, and this is the account showing exactly that balance.

The Court: (To the witness.) Do you know anything about the mailing of that account yourself?

The Witness: I know it was mailed, but I don't know when. That is, I made it up and gave it to Mr. Pauly to be sent to the Surety Company, and he told me time and again it was mailed, but as to the exact date I cannot say.

378 The Court: Mr. Pauly can state whether he enclosed a paper like that. Can't Mr. Pauly testify that he enclosed such a statement in his letter. Stand up, Mr. Pauly, and answer the question.

Mr. Paige:

Q. Do you recognize the paper I have given you? A. I do.

Q. Is that the paper which is described in this letter of July 18th to the defendant, or a copy of it? A. It is.

The Court:

379

Q. Do you know whether you enclosed it in your letter of July 18th, or a paper of which this is a copy? A. I don't remember that I did. I can't remember the specific act, but I am satisfied that I did.

Mr. Paige: The evidence is contained in defendant's admission of its receipt.

Mr. Strong: There is no evidence of that being the paper that was spoken of.

Mr. Paige: I understood the witness to say that he identified it as a copy of the account mentioned in his letter.

By Mr. Paige: On July 18th plaintiff wrote defendant, "I beg herewith to send you a statement of account of J. W. Collins, showing the amount of the deficiency to be \$374,978.22." On the 26th of July defendant wrote plaintiff, "Yesterday afternoon we received your communication of the 18th instant and enclosures," and this paper offered is that account so showing the amount of the deficiency. I now offer it. 380

Mr. Strong: I object to it.

The Court: Where is the original.

Mr. Mitchell: I notified the other side to produce these originals and I subpoenaed their president to produce them, and they said they had produced everything.

Mr. Willcox: We have made a thorough search of the files of our office, with our president, for that purpose and find no such paper. 381

Mr. Mitchell: Your Honor notices under the language of this bond, it is provided that the notice of claim based on the account is *prima facie* evidence against these defendants. It is very extraordinary that the only two letters which they have not produced are ones which contained such an account, and another letter in which they received such a statement, they (now) say they have not got.

The Court: July 18th plaintiff writes defendant

130 Frederick N. Pauly—William D. Bloodgood.

382 enclosing statement of Collins' account showing amount of deficiency.

Mr. Paige: That I offer now.

The Court: July 26th the defendant writes acknowledging plaintiff's letter of July 18th; well, you have proved that.

Mr. Paige: They produced the letter and the other enclosure, but did not produce this one, and I now offer secondary evidence of its contents.

EXAMINATION of Mr. BLOODGOOD by Mr. Paige:

I never had any other account of Mr. Collins made up showing that exact balance. I never made up
383 any other account showing that balance for the Surety Company. Mr. Pauly never had any other one while I was with him.

FREDERICK N. PAULY, recalled:

CROSS-EXAMINATION by Mr. Strong:

I do not remember specifically putting this account in that letter. I don't remember a paper being brought to me about that time. I don't remember even that any paper was brought to me at about that time. I remember that that statement was made up and I sent a copy purporting to be that state-
384 ment to the American Surety Company in a letter. I do not remember the specific act of putting it in the letter. All that I remember about it is, that I had such a letter written and sent to the American Surety Company.

WILLIAM D. BLOODGOOD, recalled:

REDIRECT-EXAMINATION by Mr. Paige:

Concerning the \$20,000 item charged on bills payable account, in regard to which I have testified on

cross-examination, I will have to make a little explanation. 385

Mr. Strong: I object to any explanation that refers to anything outside of the book.

The Witness: I cannot very well explain about this unless I explain how the transaction occurred.

Q. Do explain how the transaction occurred? A. It was on that note of the National Park Bank that J. W. Collins took credit for previously, and he charged his account and credited bills payable; put it where it ought to belong, and there it still stood. That is all there is about it. Then the National Park Bank proved their claim for the \$20,000 note. It was charged to Mr. Collins' account. He had 386 previously taken credit for that amount. He charged the National Park Bank and credited J. W. Collins, and then he charged him \$20,000 and got it out of his account and credited bills payable of the general ledger, and that made it all right. That is this \$20,000 bills payable that you asked me about, where Mr. Collins' account was charged \$20,000, and this is the matter to which I testified on cross-examination, and that is not one of the things which are set out in the bill of particulars.

The Court: It is not any of the items upon which the claim is founded.

Questioned by the Court:

387

Upon the books of the bank on September 22, 1891, there was a balance when these two certificates of deposit were given; there was a balance to the credit of Mr. Collins of about \$47,200.

The Court: Now, the Wood transaction; I don't remember about that.

Mr. Paige: Explain it.

The Witness: That was with the National Bank of Kansas City; they had a special account in order to deceive the Bank Examiner. They had a credit at the

388 National Bank of Kansas City placed to the credit of the California National Bank, which they were not to draw against, and the cashier charges on the books of the California National Bank to the National Bank of Kansas City \$20,000, and credits Collins with that \$20,000.

Mr. Strong: Whose note was that?

Witness: I think it was the personal note of Mr. Collins, with the endorsement of the bank, if I remember.

[PLAINTIFF RESTS.]

389

Defendant's counsel moves to dismiss the complaint on the following grounds:

The plaintiff has not shown that a proof of claim was made as soon as practicable after the discovery of the loss, nor within six months after the expiration or cancellation of the bond.

The plaintiff has not shown that the alleged loss was one discovered during the continuance of the bond, or within six months thereafter, nor within six months from the death, dismissal or retirement of the employee.

390 The proof of any loss whatever is insufficient, because depending upon writings not sufficiently proved by witnesses who made them or who knew when they were made, so as to make them evidence against this defendant.

No loss has been shown on any item specified in the proof of loss.

The defendant was not notified as soon as practicable of acts which might involve a loss, as provided by the bond.

There has been nothing shown amounting to fraud or dishonesty on the part of George N. O'Brien. No actual loss at all has been shown

and certainly none occurring before the beginning 391
of the action. It does not appear that Mr. George N.
O'Brien has done anything which was more than an
error of judgment, for which, as provided by the
bond, the defendant would not be liable.

There is no evidence that Mr. George N. O'Brien
has done anything which was not simply obedience
to instructions of superiors, implied by the entire
course of business of the bank.

Lastly, the negligence of the bank in not making
earlier discovery of these alleged acts.

Motion denied. Exception by defendant.

The Court: I think there are but two questions 392
of fact; that is my present impression. There may
be some further questions of fact in your defenses.
I think there is a question of fact for the jury,
whether notice was given within a reasonable time
after the discovery of the fraud; in other words,
compliance with the provision, that it should be
given you as soon as practicable. There is another
question of fact for the jury, and that is whether
the acts on which the loss of the bank arose were
dishonest or fraudulent acts on the part of the
cashier. If they were mere acts of negligence the
defendant is not liable, but if they are dishonest
acts they are liable.

Mr. Strong: There is one provision that I refer 393
to in my grounds of motion which has not been
brought to your Honor's attention. It is at line
38 of the bond. Your Honor may not have noticed
the fact that the bond provides for two notices.
There is one notice that must be given as soon as
the employer discovers any act which *may* involve
a loss. The evidence is explicit as to when he began
to make the investigation.

The Court: I will give you the benefit of a ruling
on that. I don't agree with you.

Exception by defendant.

- 394 Mr. Willcox: It would probably shorten the defense if your Honor gave us an idea of what items you consider to be in the case. I understand that several were unsupported; for instance, the \$8,500 certificate.

The Court: I regard and shall rule that \$8,500 certificate of deposit as out of the case, also the item of October 21, \$10,000 of the Western National Bank; also the other \$10,000 item of October 31st, which went to the first National Bank of Chicago, which leaves the \$7,500 certificate and the \$20,000 of October 13th of the Western National Bank and the \$25,000 of the United States National Bank, making \$52,500.

- 395 Mr. Willcox: Now, as to those items of \$20,000 and \$24,500, we want to call your Honor's attention to the fact that the proof of loss does not claim that there was any loss by them.

The Court: I am going to rule that the proofs of loss do call your attention sufficiently to those items. I have had a good deal of doubt about it.

And thereupon the defendant, to maintain the issues on its part to be maintained, called as witnesses the following:

W. L. TRENHOLM, sworn and examined as a witness for the defendant.

396

DIRECT-EXAMINATION by Mr. Willcox:

I was president of the American Surety Company of New York in the year 1891. I was Comptroller of the Currency during part of 1886, all of 1887 and 1888. The governmental control of national banks was in my department and under me, and I became reasonably familiar with the National Banking Act. I remember the application for bond No. 85,565 involved in this action. This is the paper referred to in that bond and upon which the bond was issued. I know it is the application mentioned in the bond,

because it came to my special attention, having been referred to me by the Executive Committee for action, and also because we never issue a bond except upon an application, and there has been no other application from this man for a bond, and the coincidence of time and name satisfies me that that bond was issued upon that application. 397

The application is admitted in evidence and marked Defendant's Exhibit "2."

At the time that application was made we received the application of the other officer of the bank, the only other officer of the bank for whom the bond was desired at that time, and that was the president of the bank, Mr Collins. 398

The Court: Who certified Collins? Did the cashier certify him?

Mr. Willcox: Collins was the president and nobody signed an employer's certificate for him.

By the Witness: This is the application made by Mr. Collins at that time, and which I took into consideration along with Mr. O'Brien's. They were both referred to me together.

Mr. Willcox: I want to show that they were referred to the president and he disposed of them, and then show what he relied on in disposing of them.

The Court: It isn't necessary to go into that.

Mr. Willcox: We have alleged as an affirmative defense that if these transactions on the part of O'Brien were in anywise fraudulent and dishonest, then the transactions which took place prior to the application which were of the same nature and the same character, must be construed in connection with applications wherein it was stated that Mr. O'Brien was not in default. 399

The Court: I don't think it is necessary to show by any explicit evidence that the officers of the defendant relied upon the representations made. It is to be assumed that they relied upon them.

Mr. Willcox: I would like to offer the application

400 of Mr. Collins in evidence, to go along with Mr. O'Brien's.

Objected to. Objection sustained. Exception by defendant.

Defendant's counsel reads in evidence from the plaintiff's original bill of particulars in this action, produced by the plaintiff on defendant's request, paragraph 6, as follows:

401 "The following is the date of the dismissal or retirement of George N. O'Brien and of the discovery of the acts of fraud or dishonesty referred to as alleged in the 9th paragraph of the complaint; that said George N. O'Brien ceased to be cashier of the California National Bank upon the same going into insolvency and coming into the possession of the Comptroller of the Currency of the United States, which took place November 12, 1891; that on the 29th day of December, 1891, Frederick N. Pauly, the plaintiff herein, qualified as Receiver of said bank, and took full possession of its assets under his trust, and that the acts of fraud or dishonesty referred to in paragraph 6 of said complaint were discovered during the months of February and March, 1892."

Dated July 1, 1893.

402 UNITED STATES OF AMERICA, }
State of California, } ss.:
District of California. }

FREDERICK N. PAULY, being duly sworn, says: That he is the plaintiff in the above entitled action, and believes the foregoing is a true and correct bill of particulars of the demand for which this action is brought.

(Signed.) FREDERICK N. PAULY.

Sworn to before me this }
21st day of July, 1893. }

F. P. BRUNER,
Notary Public in and for San Diego
County, Cal."

Defendant's counsel reads from the original bill of particulars in the action brought by the plaintiff against the American Surety Company, known as Action No. 2, Collins, President, said bill being produced by the plaintiff on defendant's request, paragraph 6, as follows: 403

"That the acts of fraud and dishonesty referred to in paragraph 9 of said complaint were discovered during the months of February and March, 1892."

Defendant's counsel reads from the original deposition of Frederick N. Pauly, taken in this action at San Diego, California, on his own behalf, commencing on the 24th of July, 1893, before Frederick N. Robinson, Stenographer (p. 31): 404

"Q. When did you make, if ever, any examination, by yourself or employees, of the account of J. W. Collins with the bank? A. I think my examination began early in 1892, in January or February; I think January.

"Q. Well, how was that examination prosecuted and what time did it take? A. I had an expert bookkeeper employed for a period of three months.

"Q. Did you or not find any errors or irregularities in the account of J. W. Collins with the bank? A. The bookkeepers found them.

"Q. When or about what time? A. That was some time in the first three months of the year, January, February or March. I think I became aware in January that there were irregularities in the account. 405

"Q. Well, when did you discover the amounts and special conditions, if any, of such irregularities? A. Well, I should suppose that would properly date from the time of the completion of the examination of the expert bookkeeper; just when that was, I don't know; that may be ascertained from the books.

"Q. Did you or not become aware of any real irregularities or loss to the bank through J. W. Col-

406 lins, and if so, state what you did about it? A. When I became aware that there were—

“Q. (Interrupting.) The question is, did you become aware? A. Yes, sir; I became aware that there were irregularities in Mr. Collins’ account and that the bank had suffered loss from his defalcation.

“Q. Then what did you do about it? A. When I became aware of it, I made it known to the American Surety Company that I had discovered evidences of fraud on the part of J. W. Collins.

“Q. Well, how long after you became aware of them? A. How long after I became aware of them?

“Q. Yes. A. I can’t state that exactly; it may have been two months.

407 “Q. Well, why did you wait two months before giving information to the American Surety Company about these losses? A. Because of the extensive business I had on hand and the many matters that were calling for attention every day.

“Q. Well, did you have to carry on or not, any consultations concerning these losses? A. Yes; I consulted my attorney.

“Q. Who with, and give the circumstances generally? A. I had to consult with the U. S. Attorney at Los Angeles, requiring one or two visits there in person, besides correspondence with him.”

Defendant’s counsel reads the following:

408 “Q. Well, if so, when did you first inform the American Surety Company of these irregularities and losses? A. I have a letter here in my hand that I think is the first; it is a letter from the American Surety Company acknowledging receipt of my letter of the 23d of May, 1892.

“Q. Well, what is your recollection about it? A. My recollection as to what?

“Q. As to when you sent any notices to them, if any? A. They acknowledged the receipt of mine of the 23d of May.

“Q. You have no recollection about it? A. No, sir; no recollection outside the letter.

"Q. Did you receive any response to your letter — any communication from the American Surety Company? A. I did under date May 31, 1892. 409

"Q. Have you the letter sent to the American Surety Company? A. It is in my letter book there; yes.

"Q. Have you not the letter itself? A. I have a copy of it.

"What kind of a copy? A. A letter press copy.

"Q. Taken from the original? A. Taken from the original."

Mr. Wilcox reads from page 37 the cross-examination, as follows:

410

"Q. When you took charge of the California National Bank, did you receive any instructions from the Comptroller? A. I did.

"Q. Were they in writing? A. Well partially — generally they are in a typewritten form.

"Q. Where are they? A. I think I have got a copy at the office.

"Q. Will you be good enough to produce them? A. Yes.

"Q. What did you do towards preventing the officers or employees of the bank from acting any further in their respective capacities? A. They were not permitted to act any further in their respective capacities; they were dispossessed; I had charge of the California National Bank affairs, and I do not know 411 what I can specifically allude to as preventing them, except that I was in possession and kept them from having possession.

"Q. And what day was it when you took possession? A. On the 29th of December, 1891."

Also from page 39, the following:

"Q. After you took charge, did you continue any of the officers of the bank or its employees in your employ? A. For a short time, George O'Brien.

412 "Q. How long? A. I think it was less than a month; the books will show.

"Q. Approximately some time in January, 1892? A. Yes.

"Q. Now, at the time you took charge, did you take into your possession all of the books, papers and documents belonging to or in anywise relating to the California National Bank that you found? A. I did.

"Q. Are those books, papers and documents in your possession now? A. They are unless otherwise disposed of.

"What do you mean by otherwise disposed of? A. They might be disposed of by—for instance, I might have received payment of a note; I wouldn't have that note.

"Q. But the records of the bank and those properties belonging to it of which you took possession are yet in your possession, are they not? A. They are.

"Q. Did you take possession of the books, papers and documents belonging to J. W. Collins? A. His private papers do you mean?

"Q. Yes? A. They were in my possession at one time incidentally because they were in the bank vaults, but were surrendered to the Public Administrator.

"Q. Did you take possession of his old checks and check books? A. I think so.

414 "Q. Have you them yet? A. I think we have his check books; I don't know but I have seen checks of J. W. Collins there that I think we have yet.

"Q. Did you take possession of the correspondence that was in the possession of the California National Bank and which related to other banks? A. Yes, sir; I did."

Plaintiff's counsel reads the following (p. 41):

"Q. When did you commence your examination of the affairs of the bank? A. I presume immediately after I took possession I might be said to have commenced my examination, as I did.

"Q. And how soon after your appointment was it that you were advised or were led to believe that there was a shortage in the account of Mr. Collins? 415
A. I cannot answer with any definiteness; I think within the first two weeks probably I was aware of some irregularities.

"Q. You say you became aware of irregularities. Do you state that of your own knowledge that you know there were irregularities? A. No, not then.

"Q. Do you mean somebody informed you? A. Yes; I mean some information was dropped.

"Q. And in your testimony that you have given here on this examination, when you speak of having become aware of irregularities, do you mean you knew of your own knowledge there were irregularities? A. Well, now, that depends; I am certainly 416
convinced now, if you talk about now, that there were irregularities; if you ask me about that time, then I will say the information came to me from other sources and I had my suspicions awakened.

"Q. Now you say you are convinced of irregularities? A. Yes.

"Q. Does not that arise from information given you by others and obtained, possibly, from books of the bank? A. It does.

"Q. You had no knowledge of the transactions themselves in the first instance? A. I had not.

"Q. You have no knowledge now of the transactions? A. No, except as they come from the books.

"Q. So your conviction arises simply from information from books or papers of the bank or given you by others? A. That is true. 417

"Q. What is the name of the expert accountant you employed to examine the books? A. Mr. A. A. Sparks.

"Q. Where does he live? A. City of San Diego."

Defendant's counsel reads the following (p. 42):

"Q. In your letter to the American Surety Company, of May 23, 1891, you speak of a statement enclosed of the alleged embezzlements of Mr. Collins;

418 have you a copy of that statement? A. I think not.

“Q. Do you recollect the total amount of the alleged embezzlement? A. No; I do not.

“Q. Let me refresh your memory; did not such amounts aggregate just \$81,000? A. That is the amount that is specified in the complaint, but I do not remember what I stated in that letter.

“Q. Whether it was stated in that letter or in those statements or not, the amount which you intended to convey to the surety company as alleged to have been embezzled by Mr. Collins, and which was the basis of your claim, aggregated \$81,000, did they not? A. Yes, sir.

“Q. Now, for the purpose of certainty, please
419 state the items and the amount making up that \$81,000? A. There is certificate of deposit No. 6800, issued on the 22d day of September, 1891, for the sum of \$7,500; certificate of deposit No. 6801, issued on the same day, for the sum of \$8,500; on the 13th day of October the sum of \$25,000 was obtained from the United States National Bank of New York on the note of the California National Bank and discounts of certain individual notes. The note of the California National Bank, if you desire to be particular about it, is \$17,500, and the rediscounts were, I think, enough more to make \$25,000. I think really it made \$180 more; and on the same
420 day from the Western National Bank of New York a loan of \$20,000 was obtained upon the note of the California National Bank, made payable to Mr. Collins, having as collateral to it some notes of the California National Bank; and on the 31st day of October J. W. Collins had placed to his credit on the books of the California National Bank the sum of \$10,000 without depositing that sum there to his credit.

“Q. Have you any personal knowledge that the money on certificate of deposit No. 6800 for \$7,500 was not actually paid to the bank by Mr. Collins? A. Personal knowledge; no.

“Q. Have you any personal knowledge that the

money alleged to have been received by Collins 421
from the United States National Bank, being about
\$25,000, was not paid over to the California National
Bank? A. Not a personal knowledge.

"Q. Have you any personal knowledge that the
bank suffered any loss from one of the acts of Mr.
Collins, or of Mr. O'Brien, which you have specified?
A. I have no personal knowledge, understanding by
that it required personal presence."

Also, from page 16, the following:

"Q. I understand you to say that early in the
year 1892 you presented the matters involved in the
alleged acts of Mr. Collins and Mr. O'Brien to the
District Attorney of the Southern District of Cali- 422
fornia; can you give us the precise time when you
did so consult the District Attorney on the subject?
A. Not from memory.

"Q. About when was it? A. I think some time
in January, or possibly in February.

"Q. Did you go before the Grand Jury of the
United States for the Southern District of California
and present complaints against Mr. Collins and Mr.
O'Brien? A. No, sir.

"Q. Did the District Attorney present complaints
against Mr. Collins and Mr. O'Brien based on the
information you had given him? A. Not before the
Grand Jury.

"Q. Your accent on the words Grand Jury leads 423
me to ask whether it was to some other jury that
you presented that to? A. No; it was not presented
before another jury.

"Q. To whom were the complaints presented? A.
Before a Commissioner as to Mr. Collins.

"Q. And to whom were they presented relative
to Mr. O'Brien? A. Before the Grand Jury.

"Q. Was an indictment found against Mr. Collins?
A. Yes, sir, let me see; the complaint was sworn
out against him; but whether it got to an indictment
I am not sure.

"Q. About when was the complaint sworn to?
A. I should think about the middle of February.

424 "Q. Have you had occasion to call upon Mr. George O'Brien for information and assistance since the suspension of the bank? A. I have.

"Q. Have you uniformly found him willing to assist you? A. Yes.

"Q. Has he ever refused to assist you when you have asked him for assistance? A. Never."

Mr. Wilcox: I have taken the liberty of suggesting to counsel on the other side that there ought not to be any difference between us as to the amount Mr. Pauly has realized from certain policies of life insurance on the life of Mr. Collins, which were transferred to him, and which Mr. Pauly has testified should be applied on some of these alleged
425 debits. If we can get the statement of the amount, we can then determine whether it is material.

Mr. Mitchell: There are notes outstanding.

Mr. Pauly: \$20,000.

The Court: The total amount due from him to the bank is about \$340,000.

Mr. Willcox: According to their claim.

"Q. You say in your cross-examination you began the examination of the books of the bank, in the month of January, in regard to any irregularities in Mr. Collins' account or Mr. O'Brien's. Did you carry on this examination to any great extent during the month of January? A. I think it was later
426 than that. I think that my time was so fully occupied that we did not get down to an examination until February at least."

Also the following (p. 61):

"Q. Did the United States District Attorney assist you in the preparation of the affidavits and claims that you made on the American Surety Company? A. He did."

Also the following (p. 68):

"Q. Your examination and that of your experts of the books and of the bank as I understand you

was completed some time before the latter part of the month of March, 1892, was it not? A. In a certain sense, yes; in a certain sense of the word it was; that is, I made my report to the Comptroller." 427

Defendant's counsel call on plaintiff to produce the letter book, wherein the plaintiff copied the report by him sent to the Comptroller of the Currency at Washington, in the month of January, 1892. Same produced, and defendant's counsel reads therefrom, as follows:

From plaintiff's report to the Comptroller of the Currency, dated January 27, 1892, at page 280:

"Certificate 6800, September 22, 1891, J. W. Collins, \$7,500," at the side of which is a cross; and "Certificate 6801, September 22, 1891, J. W. Collins, \$8,500," and at the side of which there is a cross. 428

Mr. Mitchell: I understand we have the liberty of referring to any part of this if it is material.

The Court: Yes.

And at page 344: "Bills Payable, Western National Bank, New York City, Note of Calif. National Bank, \$20,000, due January 15, 1892; guaranteed by Collins and Havermale; further secured by W. O. Havermale. B. D., \$10,000."

"Jamul, Portland Cement Company, \$5,000. 429

"William Collier, B. D., \$2,250.

"L. B. Howard, B. D., \$12,500.

"C. W. Marston, B. D., \$1,000.

"D. D. Dare, \$5,000.

"Collected by Calif. National Bank, November 11th, and not accounted for to Western National Bank.

"At United States National Bank, New York City, note Calif. National Bank, \$17,500, due December 15, 1891, secured by William Collier, B. D., \$4,499.65.

"Silver Gate Mfg. Co., \$8,428.40.

- 430 " Bear Valley Irrigation Co., \$5,266.65.
" Bear Valley Irrigation Co., \$5,266.66.
" A. D. Norman, B. D., \$3,500.
" C. W. Marston, B. D., \$2,500.
" Bear Valley Irrigation Dist., \$5,672.45."

Also on page 282:

"Less C. D.'s not appearing on general balance, indicated on above list, thus"—then there is a cross against it—" \$180,000."

By a Juror: Do we understand that all those notes that you read off were given as collateral to the California Bank note of \$7,500, discounted for the California Bank by the United States Bank?

- 431 Mr. Willcox: Yes.

The Juror: And that the other list is collateral to the note of the Western National? What is the \$180,000?

Mr. Willcox: Those are certificates of deposit which appear to be outstanding at the time the bank failed.

The Juror: They have not been brought into this suit at all.

Mr. Willcox: They are included in the other amounts.

H. B. FONDA, recalled:

- 432 DIRECT-EXAMINATION by Mr. Willcox:

This check bearing date October 7, 1891, drawn to the order of J. W. Collins, numbered 6024, for \$7,500, signed by S. T. Snyder, vice-president, and drawn on the Western National Bank of New York City, is the check that was given Collins on the 7th of October, 1891, on the occasion of the loan by the Western National Bank of \$7,500 on a note of Mr. Collins and Mr. Stebbins, secured by a certificate of the California National Bank for \$7,500 which certificate is numbered 6800, and has been put in evidence by the plaintiff.

Check marked Defendant's Exhibit 3.

Thomas J. Brennan.

147

I do not know of my own knowledge whether that check was paid by the Western National Bank. Judging by the stamp on the back through the Clearing House from the Hanover National Bank. I have nothing to do with that department. I should not imagine that Mr. Brennan would know this of his own knowledge. 433

THOMAS J. BRENNAN, sworn and examined as a witness for the defendant:

DIRECT-EXAMINATION by Mr. Willcox:

On October 7, 1891, I was and still am assistant cashier of the Western National Bank of the City of New York. 434

Q. Please look at the check which I show you and which has just been put in evidence and marked Defendant's Exhibit 3, and tell the jury whether that check was paid by the Western National Bank and under what circumstances?

By Mr. Mitchell:

Q. Do you know of your own knowledge? A. As an officer of the bank, in the ordinary course of business of the bank, with the knowledge that comes to me as an officer of the bank, from an examination of the bank books. I have compared this check with the Clearing House slip from the bank to which it was paid. There is no record in any book of the bank as to whom the check was paid. That is not the way in which we keep a record of those. 435

Questioned by Mr. Willcox:

The slip received with the check that goes through the Clearing House is the only record of the payment of the check and the possession of the voucher itself. That voucher is in the possession of my bank and it came back into its possession October 8, 1891, through the Clearing House. I examined the

436 records of my bank some time ago in reference to
this check.

Questioned by Mr. Mitchell:

The only record, as I have said, of the payment of that check is the list to us of that check on the Clearing House ticket, the exchange slip of the Hanover National Bank and the possession of the voucher. No record of our own is made on the check, except the cutting of the check. That shows the fact of payment. My knowledge as to whom this check was paid is based upon my inquiries as an officer of the bank to ascertain whether the
437 compared this check with the bank's record in probably two years.

Mr. Willcox: We will have to ask you to go back to your bank and get your Clearing House slip and bring it up here, and get your books if it is necessary.

The Court: I don't think it is necessary at all. This witness undoubtedly knows from the course of business, from the memorandum which he sees, where this check came from to him.

Questioned by Mr. Willcox:

That check came to our bank through the Clearing House from the Hanover National Bank. It
438 was paid by our bank to the Hanover National Bank through the Clearing House exchanges of October 8, 1891.

Questioned by a Juror:

The stamp on the back shows it was paid and the party to whom it was paid, and we would not be in possession of this check for \$7,500 unless it was paid.

Questioned by Mr. Mitchell:

I do not know to what account that was applied by the Hanover National Bank.

ALEXANDER D. CAMPBELL, sworn and examined 439
as a witness for the defendant:

DIRECT-EXAMINATION by Mr. Willcox:

I was employed by the Hanover National Bank in 1891, as head of the bank's and banker's department. There was an account on our ledger of the California National Bank of San Diego with the Hanover National Bank. This check shown me dated October 7, 1891, to the order of J. W. Collins, for \$7,500, came into the Hanover National Bank on October 7, 1891, I have no doubt, according to the paid stamp. There is nothing except the paid stamp to indicate that it came in on that day. It is customary for us to stamp without paid stamp all checks which we place with the Clearing House. There is nothing but a receipt stamp that we have received payment of the amount of the within draft. It shows that they have placed that draft to the credit of some out-of-town depositor on that day, in our bank. It is customary with us when we get any checks for deposit for any one of our correspondents or customers, whether city or out of town, to place our receipt stamp on the checks prior to sending them through the Clearing House. As far as I know, there was a deposit slip came in with that check, although I did not make out this ticket; this money was deposited by J. W. Collins.

440

441

Questioned by the Court:

This paper is a credit ticket; not a deposit slip. It is a credit ticket made out by the assistant teller at that time, and not by Mr. Collins himself. I don't think I can classify it as a deposit slip. A deposit ticket is really made out by the party who deposits the money, and a credit ticket is made out by any person in the bank, who has authority to receive such a deposit. This is in the handwriting of our assistant note teller at that time, or a young

442 man who was on the note teller's desk. That is the reason I don't classify it as a deposit ticket. It is a credit ticket. The credit shows that a check was deposited by Mr. Collins.

Questioned by Mr. Mitchell:

We have also our ledger record of the transaction.

Questioned by Mr. Willcox:

This is the original document from which the ledger entry is made.

443 Ticket referred to is marked Defendant's Exhibit 4.

The ticket reads as follows: "Hanover National Bank, N. Y., 10/7/91. Credit California National Bank of San Diego from J. W. Collins, \$7,500."

444 The Witness: There was a credit given to the California National Bank of San Diego on the books of the Hanover National Bank. I have the book here showing that credit. The signature in the middle of the ticket, at the bottom of it, is the initial of the young man that took the deposit that day—it is the clerk's signature. He initialed that to show what it is. We require all tickets to be initialed by the clerk that makes it out. The California National Bank of San Diego was credited with that sum on that day on the books of the bank.

Questioned by Mr. Mitchell:

Our ledger shows on Wednesday, October 7, 1891, that we placed to the credit of the California National Bank of San Diego \$7,500 from J. W. Collins.

Questioned by Mr. Willcox:

Our bank did not have at that time any account with J. W. Collins personally. There was an account with the California National Bank of San

Diego on our ledger, and that is the account to 445
which this \$7,500 was credited.

CROSS-EXAMINATION by Mr. Mitchell:

As I said before, the entries show that the money was received from J. W. Collins. I did not say that that showed it was made on account of a loan. I said there was a loan charged to the account on that day. I don't know anything about what collateral we had on that loan. I would not say that we have a book showing that—I cannot say that we have. We have not to my knowledge as collateral an obligation of Dare & Collins. I cannot say that our bank has any book which will show what collateral we took or we had upon that loan—possibly 446
the bank has such a book. I do not know about the collateral taken for that loan; that is entirely outside of what I have anything to do with. That is a different department entirely. The amount of that loan is \$9,000. We did not make the loan referred to on the same day that we received the check of J. W. Collins for \$7,500. The deposit was received that day; the loan had been made before—the day previous, I think; the entry reads \$9,000 on October 6th.

Questioned by Mr. Willcox:

It appears that that loan of \$9,000 referred to was made to the account of the bank.

447

Questioned by Mr. Mitchell:

It is usual in making loans to get collaterals, and I have no doubt that this loan was made on collaterals. I think our bank keeps a record of collaterals. I would not be positive whether we have a book for that purpose, or whether we have slips and the slips have been destroyed, I could not say.

Questioned by Mr. Willcox:

It appears that the loan of \$9,000 was credited to the account of the bank. The loan was made to the bank and credited to the bank.

448 Questioned by Mr. Paige:

I do not know whether about that time our bank held a note made by Dare & Collins. I have not the slightest idea whether we did or not. I do not know whether such a note was about that time charged to the account of the California National Bank. I do not know who would know. I don't know whether Mr. Collins made the arrangement verbally or whether he wrote about it. If our bank held a note coming due made by Dare & Collins, there would be a record of it on some book somewhere, and if, when it became due, it was charged up to the California National Bank, there would have been some record of that transaction somewhere. As to who the proper officer of our bank is who could tell that, I guess one of the clerks could make a search for that matter and find it out, if necessary.

Plaintiff's counsel reads from Mr. Pauly's deposition the following (p. 60):

"Q. You say, in your cross-examination, that you began the examination of the books of the bank in the month of January, in regard to any irregularities in Mr. Collins' account or Mr. O'Brien's. Did you carry on this examination to any great extent during the month of January? A. I think it was later than that. I think that my time was so fully occupied that we did not get down to an examination until February at least.

"Q. Did you, during the months of January and February, have to devote your attention closely to the other and regular business of your receivership? A. Yes; my time was very fully occupied, requiring a good deal of night work.

"Q. Did that continue for any length of time? A. For two or three months, I should think."

Defendant's counsel reads the following (p. 69): 451

"Q. Do you recollect whether the two affidavits which you speak of in your letter of June 24, 1892, as having been furnished after consultation with your legal adviser were verified before Mr. Bloodgood, Notary Public for San Diego County? A. I do not recollect; they might have been verified in Los Angeles, I am not certain.

"Q. Please look at the paper which I show you and say whether after looking at it your memory is refreshed as to who you verified those affidavits before? A. Is this a copy of them?

"Q. It is supposed to be. A. If this is a copy of them, it is certainly before Mr. Bloodgood.

"Q. It is not the place particularly that I am seeking information about, but as to the individual before whom you verified the affidavits? A. It was evidently done before Mr. Bloodgood. 452

"Q. Did Mr. Bloodgood help you to prepare those affidavits? A. Not that I remember of.

"Q. Did Mr. Bloodgood furnish any of the information on which those affidavits were founded? A. He might have assisted in furnishing the information.

"Q. Is it not a fact that those affidavits were prepared from information given you by Mr. Bloodgood, and information obtained from the books of the bank? A. Not entirely." 453

Plaintiff's counsel reads the following (p. 70):

"Q. What else did you have before you on which you made those affidavits? A. I have the information from the expert.

"Q. Mr. Sparks? A. Sparks.

"Q. So that those affidavits, then, were founded on information given you by Mr. Bloodgood and by Mr. Sparks and the books of the bank? A. Yes."

454 Defendant's counsel reads the following (at p. 70):

"Q. From any of your investigations of the books or affairs of the bank have you learned that Mr. George N. O'Brien was in any pecuniary way benefitted by any of the transactions stated in your claims against Mr. Collins and against Mr. O'Brien?
A. I have not learned that he was directly benefitted.

"Q. Are you satisfied in your own mind that Mr. O'Brien was not benefitted in any pecuniary way by any of those transactions? A. I am."

(At p. 81):

455

"Q. I understand you to say, Mr. Pauly, that it did not appear to you from any of the investigations you made that Mr. George O'Brien had been benefitted by any of the acts alleged to have been by him or by Mr. Collins committed; have I that right? A. That is so, yes; I do not understand that George N. O'Brien was benefitted directly by these acts.

"Q. Do you understand he was benefitted indirectly in any way? A. No; I have never taken any pains to follow it out; I have not supposed that he was. In fact, I do not suppose he was."

456

(At p. 29):

"By Mr. Luce:

"Q. What is your name, age, occupation and place of residence? A. Frederick N. Pauly; 52 years old."

Defendant's counsel reads from the deposition of Theodore R. Gay, taken in plaintiff's behalf at San Diego, California. 457

Said Theodore R. Gay, being duly sworn, testified as follows: My name is Theodore R. Gay; I am 59 years of age, and my occupation is real estate business. I reside in San Diego, California. I was a stockholder and a director of the California National Bank in November, 1891. I have known Mr. Collins nearly three years, and Mr. George O'Brien probably about two years. I was one of the original directors of the California National Bank. Its first cashier was J. W. Collins, and its first president William Collier, and I think Mr. Collins was cashier until Janaury 1891, perhaps January, 1890; I do not recollect which. He was cashier until he was elected president. Mr. George O'Brien's first position was teller and he attended to the collection department. He remained in that position until he was elected cashier. It was about the same time Mr. Collins was elected president. During my acquaintance with Mr. Collins I had business transactions with him. They were not very voluminous and not very many. During the course of my business acquaintance with Mr. Collins I observed his methods of business—his ways of doing business. I had talks with people concerning him as to his character and financial standing. I discussed those questions with people in San Diego. 458

“Q. From what you learned in the course of your business conversation with Mr. Collins and from your discussions with other people concerning him, what would you say was Mr. Collins' reputation for financial standing in San Diego up to the 11th day of November, 1891? 459

Objected to as immaterial. Objection sustained. Exception by defendant.

“Q. Is it not a fact that Mr. Collins was generally reputed to be a man of large means? A. Yes.”

- 460 During the time of my acquaintance with Mr. George O'Brien, I had occasion to observe his business methods, and I discussed with people about San Diego concerning Mr. O'Brien's character. At the time of his death in March, 1892, Mr. Collins was probably 46 or 47 years of age, and in January, 1891, I think George O'Brien at the time of his election to the position of cashier was about 25 or 26 years of age. I do not know what the financial condition of the California National Bank was in the spring and summer of 1891. I know nothing further than the statements which were issued and they appeared all right on the face of them. I remember that some time in 1891 I signed
- 461 notes at the request of Mr. Collins. I did not have much idea how they were to be used, I must acknowledge. I made no inquiry, but the best of my recollection now is they were to be used for the purposes of the bank, in some way to get money for the bank. I guess one of these notes was for \$25,000—that is, my name on that with others, and I did not have any personal obligation out, I think. The one for \$25,000 was brought to my office and I signed it there because the other names were on and made no question. There was no other note that I know anything about. There was a certificate of deposit with my name on the back of it. That was \$15,000 and then reduced to \$5,000. I think that certificate
- 462 was to the order of J. W. Collins. I don't recollect why my endorsement was wished on it. Mr. O'Brien brought it over to the office and it had these other names on it—Collier's name and Collins'—and asked me to sign it, and I don't know but Mr. Havermale's name was on it. I have understood that one of the methods of getting eastern money here in San Diego for use in this community was to issue certificates of deposit and then take them east, and get the money for them and bring the money here. That was a method of getting eastern money here for use in this community. I do not think that I ever discussed the method with my

other brother directors; I do not remember that I 463
ever discussed it with any of the directors. This is
the only instance where I know anything about its
being done in this case. At that particular time, I
think the bank was very desirous of getting money
here for use in this community, and that was one of
the methods to accomplish this end. While Mr.
Collins was cashier of the bank, he practically man-
aged its affairs. I think the management of the
affairs was generally left with Mr. Collins. And
while he was president of the bank the directors
left matters with him almost entirely. Mr. Collins
had previous to his being cashier of the California
National Bank, been connected with another 464
National bank as an officer, and was supposed to be
a man of banking experience. Neither Mr. Collins
nor Mr. O'Brien ever consulted me concerning the
issuance of certificates of deposit. It was not usual
for either Mr. Collins or Mr. O'Brien, or any of the
other employees of the bank to consult the directors
as a board, or individually concerning the making
of entries in accounts of depositors. I should think
it was a fact that, although Mr. George O'Brien
was cashier of the bank, he practically was a clerk
under Mr. Collins. I should say he relied on Mr.
Collins in his attention to the details of the business
of the bank. At the time Mr. O'Brien was selected
as cashier, I thought that the office should be filled,
and he seemed to me to be the only available one in 465
the institution at the time to act in that capacity,
and under the supervision of Mr. Collins, I was per-
fectly willing to trust him.

By Plaintiff's Counsel, at p. 99:

That is, I believed he would not do anything
wrong. I thought he had plenty of capacity and
ability enough to know what was right and wrong
as cashier.

466 By defendant's counsel, at p. 100:

I had full confidence of his going in as cashier under the supervision of Mr. Collins so far as details were concerned. I considered that his position as collection clerk would not be materially changed by electing him as cashier. The position had to be filled, and he seemed to act in the same capacity of attending to the collection in that department of the bank that he did before.

By Plaintiff's Counsel, at p. 101:

Mr. O'Brien was a very intelligent man.

By Defendant's Counsel, at p. 103:

467 The directors were occasionally called on for information as to making loans, sometimes in a small way, but larger loans I have never known anything about. The general management of the bank was in the hands of Mr. Collins, and left entirely to him. I did not know anything about whether the money for the certificate of deposit which I have endorsed had or had not been actually paid in to the bank at that time.

Defendant's counsel reads from the deposition of J. W. BURNS, a witness called on behalf of the plaintiff, at p. 105:

468 I am 50 years of age, and reside at San Diego, California and am a real estate agent. I was one of the original directors of the California National Bank. I got acquainted with Mr. Collins when he first came to San Diego. I guess it was about three years prior to November, 1891. Mr. George O'Brien came to my notice shortly after the bank opened—about two and one-half years prior to November, 1891. In November, 1891, Mr. Collins, from general appearance, was about forty-five years of age, and Mr. George O'Brien was at that time probably between twenty-six and twenty-eight years of age. I am only guessing at it; I have no other means of

knowing. I was one of the organizers of the California National Bank. I learned that Mr. Collins had been connected with a National bank prior to coming to San Diego. Mr. Collins was first cashier of the bank during the time that Mr. Collier was president. During the time Mr. Collins was cashier he practically managed the affairs of the bank, and he also practically managed those affairs while he was president. I do not recollect when Mr. George O'Brien first went into the employment of the bank. It was not long after it started. First he was employed as stenographer there, and attending to some correspondence and one thing and another; and then he was attending to collections. I don't know just exactly what his position was. I think he remained 469
470
in the same position until he was elected cashier. From my observations as a director, I thought that Mr. O'Brien relied upon Mr. Collins' judgment in matters connected with the bank. I cannot tell whether he did or not. That impression is derived from what transpired around the bank when I was there.

By Plaintiff's Counsel, at page 110:

"Q. Then, when you say that Mr. Collins practically managed the bank at that time when he was cashier, you did not mean to say he alone had the management of the bank, did you? A. No; however, we considered—at least I did consider he was 471
the best financier."

Defendant's counsel reads from the deposition of WILLIAM COLLIER, at page 10.

My name is William Collier. I am an attorney at law and reside at Riverside, California, and am 48 years of age. At the time of its organization I was president of the California National Bank of San Diego and continued to be until about a year prior to its failure. During the last year I was, and from the beginning, a director. The Board of .

- 472 Directors for the year 1891 consisted of J. W. Collins, D. D. Dare, Mr. Burns, Mr. Gay, Mr. Pulsifer and myself.

By Plaintiff's Counsel, at page 11:

- I was not, during the month of September, 1891, consulted as a member of the Board of Directors by J. W. Collins, as president, or George O'Brien, as cashier of the bank, relative to the issuance of certificates of deposit in the name of J. W. Collins. I was not consulted during the month of October, 1891, by J. W. Collins or George O'Brien, or by the president of the California National Bank or the
473 cashier of said bank or any other officer connected with said bank, relative to entering any credit upon the books of the bank to the account of J. W. Collins. I was not consulted during the months of October or November, 1891, by any of these officers as to the drawing or overdrawing of any of the accounts of the bank with J. W. Collins. I had no knowledge of any such transactions prior to the failure of the bank.

By Defendant's Counsel, page 14.

- I was the first president of the California National Bank, and was such president from the organization thereof, until the annual meeting preceding its
474 failure. I was succeeded by J. W. Collins. I did not know the condition of the bank in the summer of 1891. During the last year especially I was absent from San Diego almost all of the time and gave less attention to business of the bank during that year than I had done while I was president. J. W. Collins had the actual management of the bank affairs after his election as president. The directors left the management thereof largely to him I believe. I don't know of any conflict or controversy between them as to anything he did.

William Collier.

161

And at page 21:

475

It is true that the entire management of the financial affairs of the California National Bank was left largely to Mr. Collins during the year 1891. I got acquainted with Mr. George O'Brien, cashier of the bank, about the time of the organization thereof. He became an employee at that time and that was my first acquaintance with him. The bank was organized about January 1st, 1888. Mr. George O'Brien was first employed as stenographer, and used the typewriter and looked after a part of the correspondence, and I think he did some work on the books. I think he was made cashier at the time Mr. Collins was made president.

476

Defendant's counsel offers to read from the same deposition evidence concerning the character of Mr. George N. O'Brien.

Objected to. Objection sustained. Exception by defendant.

And at page 24:

I don't know how fully the directors were consulted when Mr. Collins or other directors found it necessary to borrow money for the bank. I made an inquiry at one time which led me to the conclusion that he was borrowing some money, but I don't know fully by what means he was raising it or whether he mentioned it to the others as he did to me or not.

477

By Plaintiff's Counsel, at page 25:

I know of no special directions, verbally or in writing, to Mr. Collins, except in the case I have mentioned in my direct examination, to the effect that he could manage the business of the bank without consulting the board.

478 By Defendant's Counsel, at page 26:

There was nothing apparent to my mind showing that Mr. O'Brien was acting in any different character than other cashiers in their relationship to the president of the bank, further than that Mr. Collins was a man who had had larger banking experience than Mr. O'Brien had, and I took it that Mr. O'Brien for that reason looked more especially to him than some of them probably would if on an exact equality in banking experience. He was a younger man, and had come up from a subordinate position in the bank, and I believe that he looked to Mr. Collins for information as to his duties, but his duties there were those of a cashier, just the same.

479

By Plaintiff's Counsel, at page 26:

I do not know of any instructions or directions given to O'Brien that he should be under the control of Mr. Collins, the president of the bank, and I know of no directions being given to Mr. O'Brien by the directors, or any of the officials of the bank, to conduct the business of the bank different from that of a cashier usually.

By Defendant's Counsel, at page 27:

480 While Mr. Collins was cashier I was president of the bank, and during that time I left the management of the bank to Mr. Collins, to a very large extent. I did not give it any special attention myself. As matter of fact, during the time Mr. Collins was cashier, he was practically manager of the bank with Mr. Dare. They each of them were there. Mr. Dare at that time was vice-president of the bank and was giving it his attention, and I believe was drawing a salary, and the two of them were dividing the responsibility between them in their particular departments.

Defendant's counsel reads from the the testimony 481
of FREDERICK N. PAULY, taken at San Diego, California, on his own behalf, commencing August 27, 1894:

"Q. Then, as a matter of fact, all of the claims which arose by reason of the matters included in your claims against the American Surety Company were in the first instance rejected, were they not? A. They were all at first rejected. Perhaps I ought to make an explanation that the First National Bank of Chicago never presented any claim on account of that \$10,000.

"Q. Was that \$10,000 item included in the claim against the American Surety Company? A. No claim has been made on me for it. 482

"Q. Was that \$10,000 item upon which the First National has never made any claim on you, one of the \$10,000 items of October 31, 1891? A. It is.

"Q. And the other \$10,000 one was rejected? A. You mean on that deposit tag?

"Q. Yes? A. No claim was ever made for it."

Also the following, at page 83:

"Q. When did you first have knowledge of the particular acts of fraud or mismanagement which may or may not have occasioned loss to the California Bank? A. I cannot fix that date to any certainty. I suppose it was some time in the fore part of 1892, probably February or March; it must have been February, because Mr. Collins was arrested. I don't remember the period exactly." 483

Plaintiff's counsel reads the following:

"Q. When was that examination of the books complete to such an extent that you had a specific knowledge of the various things?"

Objected to on the ground that it calls for the opinion of the witness; that it is immaterial, irrelevant and incompetent and as calling for a

484 conclusion. Objection overruled. Exception by defendant.

"A. June, 1892.

"Q. From what source did you learn these facts specifically, so as to be assured?"

Same objection, ruling and exception.

"A. From Mr. Sparks' and Mr. Bloodgood's examinations."

Defendant's counsel reads from the deposition of FREDERICK N. PAULY, taken in the case of Pauly vs. The Equitable Life Insurance Company, at San Diego, California, as follows (p. 133):

485 "Q. What was the condition of the bank as to its solvency at that time? A. At the time I made the examination and completed it, which occupied two or three weeks—this examination was made within a period of two or three weeks from the date of my appointment, which was the 29th day of December, 1891—my opinion, without referring to the data, is that the bank was insolvent at that date."

Mr. Pauly questioned by the Court:

The Court: About how much was the difference between the resources of the bank and its liabilities at the time you took possession? A. That would
486 depend upon the value of the assets that came into the hands of the Receiver. Some had been realized upon and some had depreciated, and they are still retained, so that it is difficult to say what their value was.

The Court: One of the jurors wanted to be informed about one or two facts. One is, what was the capital of the bank?

Mr. Bloodgood: \$500,000. At the time the report was made up the bank's liabilities were \$1,200,000. This was not in excess of assets. I don't know the exact amount of loss.

The Court: Don't you know, Mr. Pauly, about 487
what was the difference between the resources and
liabilities—I don't want it accurately—at the time
you took possession?

Mr. Pauly: That would depend upon the value of
the assets that came into the hands of the Receiver.
Some have been realized upon and some have de-
preciated, and they are still retained, so that it is
difficult to say what their value was.

Q. Couldn't you form an opinion? A. I should say
some 35 per cent. has been paid on \$900,000, and I
should estimate the varied resources of the bank at
present, including a little stockholders' liability, not
yet paid, about \$200,000. There have been four
dividends, three of ten per cent. each and one of 488
five, but I cannot remember the dates at all.

By a Juror:

Q. Did I understand you to say that there was
\$300,000 realized, or thirty-five per cent. on \$900,000?
A. Thirty-five per cent. on \$900,000 has been paid
in dividends.

Q. And were the assets of the bank \$900,000? A.
The claims proven against the bank amount to
\$900,000.

By Mr. Pauly:

To meet the obligations of the bank for \$900,000
I received only about \$100,000 to \$150,000, exclusive 489
of the amount received from stockholders on assess-
ments.

Q. And now you say the value of those remaining
is \$200,000? A. It is about \$200,000, as near as we
can estimate it.

By Mr. Mitchell:

Q. About how much did you receive from stock-
holders in the way of assessments? A. About
\$200,000.

490 WILLIAM D. BLOODGOOD, recalled:

CROSS-EXAMINATION by Mr. Wilcox:

I recognize the paper shown me. It looks like the paper which has been by the plaintiff put in evidence on the theory that it is a copy of a paper that was mailed to the American Surety Company about July 18, 1892. It looks like the paper that I had here yesterday—if it is the one that is in evidence. I don't know. The statement of account which was sent to defendant was made up by me. When I say the statement of account that was sent to defendant I assume that such statement was sent. This is supposed to be a copy of the statement which
491 I assume was sent to the defendant. It is a copy of it—no, this is the original. The one sent was a copy. I wrote the copy. It was supposed to be an exact copy. So far as I know it was an exact copy. I did not make this up. I called off the items to Mr. Sparks and he wrote it. This one which is called the original is in the handwriting of Mr. Sparks. I got the data that was used to make up this account from my other books—from all the books. In making it up I used the books and information—information obtained from facts—letters—letters from different banks—general facts in the bank—from investigations made by us and submitted to the United States Attorney, and by him
492 examined to determine whether they should be legal credits or whether they should be thrown out. Everything is in that account; all the debits and all legal credits; illegal credits were thrown out; I mean that credits were thrown out which were said to be illegal by the United States Attorney, so that the United States Attorney and Mr. Pauly and Mr. Sparks and I undertook to determine whether those credits were legal or illegal in making up this account.

Q. Did you not charge Mr. Collins' account with every conceivable item concerning which you had

any doubt? A. We always gave Mr. Collins the benefit of the doubt, if it was even on a credit. I was acting under the instructions of Mr. Pauly. The question of whether we could credit Mr. Collins or debit Mr. Collins' account was passed on by Mr. Pauly on these credits. We charged Mr. Collins in that account with the \$10,000 item which it has been assumed was connected with the Western National Bank of New York of October 31, 1891; it is here in the account. We did not credit Mr. Collins with the item correcting the entry which I have already testified was made in the ledger on the 9th of November, 1891, so that in that account it would seem we charged Mr. Collins with that \$10,000, although the books of the bank showed that at the time we made up that account Mr. Collins' account was entitled to the benefit of the correcting entry.

Q. Now, can you tell this jury why you apparently put in an account which you rendered the American Surety Company and the basis of a claim against the Surety Company on Mr. Collins' bond—why you put in that an item of \$10,000 which the books showed was not correct? A. We put that in there because the United States District Attorney said that when Mr. Collins charged his account he had no funds there, and it was an attempt made to correct an entry; that his previous credits were all illegal and thrown out, and his account was largely overdrawn when he charged that \$10,000 and he had no money there; and he said you could only throw out illegal credits. Mr. M. T. Allen, of Los Angeles, is the United States Attorney to whom I refer. He was Mr. Pauly's attorney most of the time from the commencement of Mr. Pauly's receivership. Mr. Pauly had other counsel in San Diego. Los Angeles is about 120 miles from San Diego, I believe, so that Mr. Pauly had counsel in each place just on that account. It took a long time to get letters back and forth. It would take only a short time in the usual course of business for a letter to

496 get from San Diego to Los Angeles if the matter was given immediate attention. A letter mailed in San Diego one day would reach Mr. Allen the next. The length of time it took to get an answer depended on the length of time it took Mr. Allen to attend to it. We did not leave off anything from the credit side of Collins' account that was doubtful. We gave him the benefit of the doubt. We left off all such notes as have been in evidence here. I am certain of that. Mr. Collins was dead when this work was done, and Mr. Collins was dead when this claim was first presented to the American Surety Company.

497 Questioned by the Court:

There were telegrams referring to those deposits of October 13th and 14th.

Mr. Strong: They were rejected.

The Court: On your objection.

Mr. Strong: Yes, sir; they were cipher telegrams. They were in cipher.

By the Witness: I believe it is all translated on those telegrams. I believe it is in Mr. O'Brien's writing over some of these cipher words.

By the Court:

498 It is somewhat doubtful whether the plaintiff could put those telegrams in evidence. I don't know whether the plaintiff has been able to identify them sufficiently as received by the bank at the time. If they were found in the possession of the bank, no doubt the defendant could produce them; I should think it would throw some light on these transactions.

Mr. Paige: We offered them.

The Court: I had forgotten. They were excluded on the objection of the defendant.

I last saw Mr. O'Brien over a year ago.

Questioned by Mr. Willcox:

499

There is an item concerning which some testimony has been given here of \$40,000 of May 2, 1891, which I remember.

This deposit slip now shown me, bearing date May 2d, is the one which relates to that item. It is in the handwriting of Henry O'Brien, the general bookkeeper of the California National Bank.

Q. Is there anything on that deposit slip from which you can tell how the credit which is thereby given was supposed to have arisen? A. It was supposed to be on some sort of paper or otherwise. The deposit slip is of the California National Bank, dated May 3, 1891, credit of J. W. Collins, Brunel & Company, Chicago; two items of \$20,000 each, aggregating \$40,000.

590

Q. Please turn to the teller's cash of that day and see if you do not find an entry there of the receipt of that sum of money? A. This is not in the "cash"; it is in the general credits. The book shows apparently that \$40,000 was deposited on that day. That it is one of the items which was deducted from Mr. Collins' account in the making up of this account. In other words, we deducted from Mr. Collins' account \$40,000, even though the teller's cash showed it had been received. There was nothing in that statement rendered the American Surety Company that showed that deduction from Mr. Collins' account; but I think, in a previous statement, or in a statement of some kind, the defendant had a statement of these large amounts which we charged them with. It is attached to one of these affidavits verified June 24th at San Diego by Mr. Pauly, before me, notary public. I know of nothing sent to the American Surety Company that I know of that informed that company what deductions had been made from Mr. Collins' account, or why the deductions had been made.

501

502 Questioned by the Court:

This item of \$40,000 composed of the two \$20,000 items of May 2d is disallowed Mr. Collins in our accounts on the theory that it was illegal. I explain why it was done. That time it was simply a "cash" item. The teller's book shows that the bank bills in the vault were increased that day \$40,000. The previous day it was \$19,500, increased to \$59,500. And with the letter "I" alongside of it, denoting that it was an "item." The information was given me direct in the bank that those were cash items and stood for items.

By Mr. Mitchell:

503 By cash items I mean simply a memorandum—no real cash transaction.

By the Court:

Simply paper which is called cash.

By Mr. Mitchell:

Brunel & Company, I understood, were a hardware concern. if I remember correctly, which Mr. Collins was connected with.

Q. Was it then in existence? A. I don't know. I don't know anything about it.

504 Questioned by a Juror:

The other deposit slips of that day would account for all the cash received. I have never gone over the others to find out whether, if checked back, they would account for all the cash that was received that day. This \$40,000 item has never been charged back to Collins. It stands now to his credit. There is no entry without using slip of some kind. He must have used it as cash and carried it as such. It never got out of his cash, except \$25,000, which went out of that account on the 16th of May; that

is \$25,000 of that \$40,000, and the slip of \$15,000 was counted in the teller's cash as cash. 505

By the Court:

The \$25,000 item got out by being charged to the First National Bank of Chicago. That reduced the item. It went out merely by bookkeeping. That is all, on May 2d. I believe it was the 18th. I can't remember now.

Questioned by Mr. Willcox:

This paper now shown me bearing date June 24, 1892, is in the handwriting of Mr. Pauly, and the signature of the notary public is written by me. I do not remember the verification by Mr. Pauly on that document. I did not draw it or assist in drawing it; I had nothing to do with it, those legal papers. 506

DAVID B. SICKELS, sworn and examined as a witness for the defendant.

DIRECT-EXAMINATION by Mr. Willcox;

In July and August, 1891, I was second vice-president of the American Surety Company of New York. I identify this application for bond of O'Brien shown witness as the application for the bond sued upon herein. Neither the American Surety Company of New York nor any of its officers knew anything contrary to the statements in that certificate contained. This application is the one referred to in the bond sued on in this action. This bond is signed by me and was issued in reliance on the truth of the statements contained in that application. I did not know, neither did any of the company, know of any wrongdoings or suggestion of wrongdoing by Mr. Collins or Mr. O'Brien at the time that bond was issued. 507

508 FERDINAND W. LAFRENTZ, sworn and examined as
a witness for the defendant.

DIRECT-EXAMINATION by Mr. Strong:

Defendant's counsel called upon the plaintiff
for the book of individual balances of the Cali-
fornia National Bank and the plaintiff replies
that he has not brought it.

I am an expert accountant, and am now with the
American Surety Company. I have been with them
permanently since, I think, March or April 1st of
this year. Previous to that, and for fourteen years
509 past, I have been an expert accountant. My resi-
dence and place of business was at Ogden, Utah.
In July, 1893, and August, 1894, I went to San
Diego to the California National Bank. I was at
the office of Mr. Pauly making an examination of
the books and papers of the bank. Mr. Pauly was
not at the bank then. Mr. Pauly produced all
books and papers for which I called. At that time
he produced the individual balance book. I ex-
amined and made a copy of it, so far as it relates to
Mr. Collins' account between the dates of July 1,
1891, and November 11, 1891. That is to say, from
the date of the bond to the time when the bank
closed its doors. I have the transcript. That shows
the state of Mr. Collins' balance daily during the
510 period I have mentioned, on days when the bank
does business—that is, week days, not Sundays. As
shown by the individual balance book, the balance
in the account of Collins, on July 1, 1891,
was \$68,069.67 to his credit. On September 22,
1891, the individual balance book showed that
there was to the credit of Collins on
that day \$47,796.20. On October 13th, 1891,
the individual balance book showed that there was
to the credit of J. W. Collins on that day \$98,038.32.

Ferdinand W. Lafrentz.

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On October 14th there was to the credit of J. W. 511
Collins, according to the individual balance book,
\$97,836.66. On October 31st there appeared to be
to the credit of J. W. Collins, according to the in-
dividual balance book, \$62,106.47.

Questioned by the Court:

On November 11th, the day when the Federal
authorities took possession, there was \$11,420.90 to
his credit, according to this book.

Questioned by Mr. Mitchell:

These records were taken from the individual 512
balance book, not from the ledger account.

Mr. Paige: I suppose your Honor notices that the
balance given by this witness on the 22d of September
was the same as figured by Mr. Bloodgood from
the ledger on the same date.

The Court: Yes. I suppose the books would have
to tally.

[DEFENDANT RESTS.]

Defendant's counsel moves to dismiss the com-
plaint, or for the direction of a verdict on all the
grounds heretofore specified and the additional 513
grounds that according to the testimony now there
were acts concealed from the defendant which were
of precisely the same character as those upon which
the claims in suit are based, so that if the one were
dishonest and fraudulent the other was; and upon
the ground of misrepresentation in the application
for this bond—misrepresentation by Mr. O'Brien
and by Mr. Collins and misrepresentation by the
bank itself acting through Mr. Collins.

Motion denied. Exception by defendant.

- 514 The Court states to the defendant's counsel that it does not think there is anything to discuss in the case except the claim which arises out of the transaction of the 13th and 14th of October.

Mr. Strong addresses the jury on behalf of defendant.

Mr. Mitchell addresses the jury on behalf of plaintiff.

Defendant's counsel presents the following requests to charge:

DEFENDANT'S REQUESTS TO CHARGE.

- 515 1st. There can be no recovery in this action upon or by reason of certificate of deposit number 6800 for the sum of \$7,500.

2d. There can be no recovery in this action upon or by reason of certificate of deposit number 6801 for \$8,500.

3d. There can be no recovery in this action for or by reason of the loan of \$25,000 from the United States National Bank of New York on or about the 13th or 14th day of October, 1891, nor for or by reason of any credit alleged to have been given by reason of such loan.

- 516 4th. There can be no recovery in this action for or by reason of the loan of \$20,000 from the Western National Bank on or about the 13th or 14th day of October, 1891, nor for or by reason of any credit alleged to have been given by reason of such loan.

5th. There can be no recovery in this action for or by reason of the credit of \$10,000 on the 31st day of October, 1891, which was afterwards charged back to the account of Collins before the failure of the bank.

6th. There can be no recovery in this action for or by reason of the other credit of \$10,000 on the 31st day of October, 1891, claimed by plaintiff to be connected in some way with the transaction with the First National Bank of Chicago. 517

7th. There can be no recovery in this action for or by reason of any of the bank's assets mentioned in the bill of particulars as having been used by Collins, as collateral, even with the United States National Bank or the Western National Bank.

8th. If the jury find upon the evidence that the plaintiff did not as soon as it came to his knowledge that O'Brien had been guilty of an act or acts which might involve a loss to be claimed by the Surety Company under the bond, notified said company as soon as practicable, after obtaining such knowledge, then there can be no recovery in this action. He could not delay giving such notice until he had actually discovered that such act or acts did involve a loss. 518

9th. If the jury find upon the evidence that on or before the first day of February, 1892, Mr. Pauly knew of any act of O'Brien which *might* involve a loss to the Surety Company under the bond in suit, then they must find a verdict for the Surety Company.

10th. If the jury find upon the evidence that on or before the first day of March, 1892, Mr. Pauly knew of any act of O'Brien which *might* involve a loss to the Surety Company under said bond in suit, then they must find a verdict for the Surety Company. 519

11th. If the jury find upon the evidence that on or before the first day of April, 1892, Mr. Pauly knew of any act of O'Brien, which *might* involve a loss to the Surety Company, under the bond in suit, then they must find a verdict for the Surety Company.

520 12th. If the jury find upon the evidence that on or before the first day of May, 1892, Mr. Pauly knew of any act of O'Brien which *might* involve a loss to the Surety Company, under the bond in suit, then they must find a verdict for the Surety Company.

13th. If the jury find upon the evidence that the plaintiff did not serve upon the Surety Company written proof of his claim as soon as practicable after the discovery of any loss occasioned by the acts of O'Brien, then there can be no recovery in this action, and by serving such proof of claim "as soon as practicable," is meant that the plaintiff must have served it as soon as by the exercise of reasonable diligence he was able to draw and verify such written proof of claim, and transfer it to the company.

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14th. If the jury find upon the evidence that on or before the first day of March, 1892, Mr. Pauly knew of any of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company.

15th. If the jury find upon the evidence that on or before the first day of April, 1892, Mr. Pauly knew of any of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company.

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16th. If the jury find upon the evidence that on or before the first day of May, 1892, Mr. Pauly knew of any of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company.

17th. There can be no recovery in this action upon any item of claim made at this trial unless a claim in regard to such item was set forth in the proof of claim served upon the defendant in July, 1892, nor

unless such item of claim has been proven upon this trial as it was set forth in said proof of claim. 523

18th. If the jury find upon the evidence that Collins gave to the bank his check for \$10,000, to apply against one of the credits of \$10,000 each of October 31, 1891, and that the bank received and used this check, charging it against him in his account, then there can be no recovery on account of that credit of \$10,000.

19th. Before any recovery can be had in this action upon either of the certificates of deposit numbered 6800 and 6801, the plaintiff must show that it was *dishonestly* or *fraudulently* issued by O'Brien; that it was used for Collins' own personal benefit instead of for the bank, and that the bank has suffered loss thereby. 524

20th. Even if the jury find that the credits of \$25,000 and \$20,000, for which plaintiff seeks to recover, were fraudulent and dishonest to the knowledge of O'Brien, that alone does not make out the plaintiff's claim. He must show that a loss resulted from these credits, and in considering this latter question the jury must not regard the alleged earlier false credits that have been given in evidence. These earlier credits have no legitimate bearing upon this question of loss from the later ones. 525

21st. There can be no recovery in this action for or by reason of any items here claimed, unless the jury find upon the evidence that O'Brien was guilty of some conduct in respect to that item, which can properly be considered dishonest or fraudulent. It would not be enough for the plaintiff to show merely that for some reason or other Collins was not entitled to the money sought to be recovered.

22d. Before a recovery can be had upon any one of the alleged false credits mentioned upon this trial,

526 it must be shown by the plaintiff that such credit was actually a false credit. The credit itself as entered upon the books of the bank was, in itself, an admission binding upon the bank and upon this plaintiff that the bank had received from Collins money or value to the amount of the credit, and this admission must, in some way, be overthrown by the plaintiff before he can claim to recover for or by reason of that credit.

23d. The books and papers of the bank are not of themselves nor are any entries therein, binding upon this defendant or evidence against it and the jury must not accept as evidence any entries therein unless
 527 established by the testimony of some witness having personal knowledge of the transaction to which the entry relates, and establishing such transaction by means of such knowledge.

24th. There can be no recovery in this action for or by reason of any act of the cashier O'Brien which the jury shall find upon the evidence to have been a mere error of judgment, or an injudicious exercise of discretion, or which was done by him in good faith in pursuance of any direction, instruction or authorization received by him from any duly authorized officer of the bank, or any act which the jury may find that he performed, believing it to be
 528 done in the course of a transaction for and on behalf of the bank itself.

25th. The plaintiff cannot recover in this action merely because O'Brien was careless or even stupid in the discharge of his duties as cashier, no matter how much loss was thereby occasioned to the bank.

26th. If the jury find upon the evidence that the cashier O'Brien did not act dishonestly or fraudulently with reference to any of the items claimed upon this trial, but believed in good faith from his knowledge of the prior course of business that the

transactions in which he is charged to have participated, although carried on in the name of Collins, were in reality for account and benefit of the bank, then there can be no recovery in this action because of the part which he took in any such transactions. 529

27th. In considering the question whether or not any loss for which plaintiff seeks to recover was occasioned by dishonest and fraudulent acts on the part of O'Brien or whether it was the result of acts which could not be called either dishonest or fraudulent, the jury are entitled to consider, if there is any doubt about the facts, the previous good character and good reputation of O'Brien, if they shall find that the previous character and reputation were good. 530

28th. The law presumes, in the first instance, that O'Brien was innocent of any fraud or dishonesty in connection with any of the transactions, on account of which plaintiff seeks to recover; and even if Collins himself was defrauding or robbing the bank in any way, the law presumes that O'Brien did not understand this to be the case and was not aiding Collins in so doing. This presumption will of itself be enough to defeat the plaintiff unless he can in some way overthrow it.

29th. The plaintiff has not overthrown the presumption of innocence and honesty on O'Brien's part, unless there is evidence in the case that cannot be reconciled with such innocence and honesty. If all the facts in evidence, taken together in their proper relation to each other, permit the belief that O'Brien was innocent, if it leaves room for the inference of an honest intent, the plaintiff has failed to make out his case and cannot recover. 531

30th. If the jury come to the conclusion upon the evidence that upon all the facts and circumstances known to O'Brien he might have believed in

532 good faith that there was nothing wrong about Collins' transactions as to which plaintiff seeks to recover, then they will render a verdict for the surety company.

31st. The plaintiff is bound to convince the jury upon the evidence that O'Brien must have known and did know that the transactions of Collins upon which a recovery is here asked were dishonest and fraudulent. If he fails to satisfy the jury of this they must render a verdict for the surety company.

32d. On the question of fraud or dishonesty the burden of proof is on the plaintiff from first to last.

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33d. If the jury find upon the evidence that Collins acted for the bank in procuring the bond sued on, and that before procuring this bond he had been guilty of dishonest and fraudulent conduct in connection with his duties as president, and that this fact was known to O'Brien, but was concealed from the surety company, then there can be no recovery in this action.

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34th. If the jury find that at the time of making application for or receiving the bond in suit any person acting for the bank represented to the surety company that the accounts of the cashier O'Brien had been examined, and had been found to be correct, and that the surety company relied upon such representations when in truth those accounts showed that prior to this time Collins had been guilty of dishonest and fraudulent conduct in his connection with his duties as president of the bank, then there can be no recovery in this action.

35th. If the jury find that at the time of making application for the bond in suit any person acting for the bank falsely and fraudulently, and with knowledge to the contrary, represented to the surety company that the accounts of the cashier O'Brien

had been examined, and had been found to be correct, when in truth those accounts showed that prior to this time Collins had been guilty of dishonest and fraudulent conduct in connection with his duties as president of the bank, then there can be no recovery in this action. 535

36th. If the jury find upon the evidence that the bond in suit was procured by concealment or misrepresentation of any facts showing prior dishonest or fraudulent conduct on the part of O'Brien, then the plaintiff cannot recover, no matter who was guilty of such concealment or misrepresentation. The bank cannot now enforce the bond without being affected by the consequences of such concealment or misrepresentation. 536

37th. If the jury find upon the evidence that a reasonable amount of care exercised in the supervision of the president and cashier of the bank, and in the examination of its books and papers, would have disclosed the fact that Collins had been guilty of dishonest and fraudulent conduct in connection with the performance of his duties as president of the bank, and that the directors or the other officers of the bank wrongfully and negligently omitted to exercise such supervision and make such examination, the bank cannot under these circumstances take from the Surety Company a bond to answer for the faithful performance by Collins of the same duties in the future and hold the surety company responsible for similar misconduct on his part thereafter, and there can be no recovery in this action. 537

38th. In the event of finding a verdict for the plaintiff the jury can only find a verdict for such amounts, if any, as the evidence shows that the bank actually lost through or by reason of the certificates of deposit, or the various credits which have been spoken of on the trial. In the case of the certificates of deposit, the loss would be such amounts,

538 if any, as the bank had been shown to have been compelled to pay prior to the beginning of this action to regain possession thereof.

39th. If the jury find a verdict for the plaintiff, they will render a special verdict stating the items of claim for or on account of which the verdict is rendered, and the amount of loss which they find to have been sustained by the bank on account of each of such items.

CHARGE:

539 WALLACE, *J.*--Gentlemen of the Jury: As you doubtless understand, this suit is brought by the Receiver of the California National Bank of San Diego, California, against the American Surety Company of New York, the defendant, to recover upon a bond executed by the defendant of the date of July 1, 1891. That bond is in legal effect an insurance policy, by which the defendant undertook to guarantee the bank against loss arising from the fraud or dishonesty of its cashier, O'Brien, committed incidentally to the discharge of his duties as cashier, subject to various conditions and provisions to which I shall hereafter more particularly call your attention; and I will read some parts of the bond:

540 "Now, therefore, in consideration of the sum of \$75 paid to the Company as a premium, for the term of twelve months after the first day of July, 1892, it is hereby declared and agreed that subject to the provisions herein contained, the company shall within three months next after notice accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer, of moneys, securities or other personal property in the possession of the employee, or for the possession of which he is responsible, by any act

of fraud or dishonesty on the part of the employee 541
 in connection with the duties of the office or position
 hereinbefore referred to, occurring during the
 continuance of this bond and discovered during said
 continuance, or within six months thereafter and
 within six months from the death, dismissal or re-
 tirement of the employee from the service of the
 employer. Provided always that the Company shall
 not be liable"—that is, the defendant shall not be
 liable—"by virtue of this bond for any mere errors
 of judgment or injudicious exercise of discretion on
 the part of the employee."

The bond contains the following provisions subject
 to which the company is to become liable:

"The Company shall be notified in writing, at its 542
 office in the City of New York, of any act on the
 part of the employee which may involve a loss for
 which the Company is responsible hereunder, as
 soon as practicable after the occurrence of such act
 shall have come to the knowledge of the employer.
 Any claim made in respect to this bond shall be in
 writing, addressed to the Company, as aforesaid, as
 soon as practicable after the discovery of any loss
 for which the Company is responsible hereunder,
 within six months after the expiration or cancella-
 tion of this bond."

It is alleged by the plaintiff that the bank sus- 543
 tained loss within the meaning of this bond by cer-
 tain acts of fraud or dishonesty on the part of the
 cashier, committed incident to his duty, which took
 place in the month of October, 1891; and if the
 plaintiff is entitled to recover at all he is entitled to
 recover only because of the commission of such acts
 on the 13th and 14th day of October, 1891. On
 those days the cashier participated in giving to the
 president of the bank, Mr. Collins, a credit in two
 items amounting to \$44,500, and I believe another
 item of \$500, which is not of any importance and to
 which I shall not make any reference; and by the
 assistance of the cashier personally Mr. Collins was

544 credited in his private account with the bank in the sum of \$44,500 as though he had placed the bank in the possession of funds or securities, or credits, in one item of \$24,500, coming from the United States National Bank of New York, and in another item of \$20,000 coming from the Western National Bank of New York.

Now, it appears without any dispute that at about those dates Mr. Collins in New York procured from these two banks rediscounts of paper belonging to the California National Bank with the United States National Bank of New York in the amount of \$24,500 or about \$25,000, and with the Western National Bank in the amount of about \$20,000. If
545 any sum of money accrued from those transactions or any securities, the money or the security was the property of the bank and not of Mr. Collins personally, and Mr. Collins personally was not entitled to the two items of credit which were transferred to his account on the dates of October 13 and 14, 1891.

The bank suspended on the 12th of November, 1891. From that time until the 18th of December its affairs were in charge of the officers of the Government under the directions of the Comptroller of the Treasury.

On the 18th day of December, 1891, the plaintiff was appointed Receiver, and about that time entered upon the discharge of his duties as such. An
546 investigation followed into the affairs of the bank and it was subsequently ascertained that at the time of the failure Mr. Collins, the president of the bank, was indebted on his private account to the bank in the neighborhood of \$440,000. It is possible the amount was somewhat less than that and that there were some errors arising from credits to which he was entitled, and they were not given to him in the accountant's statements; but in any event he was indebted in a very large amount of money. It was also discovered that the bank's general liabilities were in the neighborhood of \$900,000; and it is in evidence before you that the Receiver has been

able to realize thus far, by assessments from stock- 547
holders of the bank and from collection, of its assets,
from all sources the sum of about \$200,000.

The first question which will merit your consid-
eration is whether in consequence of these transac-
tions to which I have referred, of October 13th and
14th, the bank sustained a loss, and if so whether
those transactions were fraudulent or dishonest acts
on the part of the cashier. It will be unnecessary
to spend any time in the inquiry whether the bank
sustained any loss by reason of those transactions;
though I leave it as a question of fact for you to
determine how the fact is. The grave question is
whether the cashier was in complicity with Collins
in giving him a false credit upon the books of the 548
bank.

Now I shall not discuss the details of the evidence.
If the conduct of the cashier in that transaction was
a mere error of judgment, was an honest irregularity,
that is the end of this case and the plaintiff is not
entitled to recover; but if he, knowing that Collins
was not entitled to be credited with these two
items, believing that he was not entitled to be
credited with them, nevertheless put those items to
his credit, that was a dishonest act, and it was a
fraudulent act, within the meaning of this bond.
Now what is your conclusion upon this question of
fact? Fraud is not to be lightly presumed. Every
man is supposed to be honest until the contrary is 549
shown. But fraud, which consists of a dishonest
intent, can rarely, if ever, be proved by direct evi-
dence. It must be shown by circumstantial evi-
dence, because the secret workings of the mind are not
revealed to the world. It is impossible therefore, for
this plaintiff, unless the cashier himself had been
willing to take the stand and state what the fact
was, to show directly that the cashier was in-
pelled by a dishonest mind when he made out these
deposit slips and authorized the entry of these credit
items to the account. What are the circumstances
from which you are at liberty to infer his knowl-

550 edge? The cashier is the executive, financial officer of such an institution. Ordinarily he has a more intimate knowledge of the situation of the bank than any other officer connected with it. In this instance this cashier had been in the control of this bank for several weeks at the time this transaction took place. The testimony is that Mr. Collins had been absent six or seven weeks, returning on the 4th of November; the vice-president was absent; and during this period of time, therefore, the bank seems to have been in the control of the cashier as the responsible executive officer. On the other hand, it is said that he was a young man of 24 years of age, with very little experience; and you
551 may come to the conclusion, notwithstanding he was the cashier of the bank, notwithstanding the ordinary presumption that a person in his position knows more than anybody else about the true state of affairs connected with it, that this confiding youth, whenever he was told by Mr. Collins that Mr. Collins had obtained a credit at some distant place for the benefit of the bank, believed it, and, acting upon that belief, gave Mr. Collins credit in his private account. Now, it is for you to say what are the probabilities of such a transaction. If he honestly believed that Mr. Collins had placed in these New York banks to the credit of the San Diego bank, from his own resources
552 the amount of these two items, why that is the end of this case. And as bearing upon this question, there are various other transactions to which reference has been made in the testimony. There is evidence of other acts of fraud or irregularity on the part of Collins and this cashier. It would have been very satisfactory if we had been permitted to see the telegrams addressed by Mr. Collins to this cashier on the dates when these entries were made. They are not in evidence, their introduction having been objected to by the defendant, and therefore we are without any light which they might throw upon the situation. The burden is upon the plaintiff to sat-

isfy you by a fair preponderance of evidence that 553
these credits were given to Collins by the fraud or
the dishonesty of the cashier. If you come to the
conclusion that the plaintiff has established that fact,
then the plaintiff is entitled to recover the full
amount of this bond, assuming that you find that
the bank sustained loss in consequence of the acts,
with interest beginning at the expiration of three
months after the first of July, 1892, unless you find
that there has been a failure on the part of the plain-
tiff to comply with some of the provisions of the
policy in respect to notice. Now I have read you the
clause of the policy in respect to notice of acts which
may involve loss to the defendant. Under that 554
condition of the policy the defendant was entitled
to notice in writing of any act of the cashier which
came to the knowledge of the plaintiff of a fraudu-
lent or a dishonest character as soon as prac-
ticable after the plaintiff acquired knowledge. It is
not sufficient to defeat the plaintiff's right of action
upon the policy that it be shown that the plaintiff
may have had suspicions of dishonest conduct of
the cashier; but it was plaintiff's duty under the pol-
icy, when it came to his knowledge, when he was
satisfied that the cashier had committed acts of dis-
honesty or fraud likely to involve loss to the defend-
ant under the bond, as soon as was practicable
thereafter to give written notice to the defendant.
Now, the written notice, the first written notice, 555
was given on the 23d day of May, 1892. And in
considering this issue you are to inquire first, when
it was that the plaintiff became satisfied that the
cashier had committed dishonest or fraudulent acts
which might render the defendant liable under this
policy. He may have had suspicions of irregulari-
ties; he may have had suspicions of fraud, but he
was not bound to act until he had acquired knowl-
edge of some specific fraudulent or dishonest act
which might involve the defendant in liability for
the misconduct. Now, when was it he acquired
such knowledge? A good deal of testimony has

556 been introduced here upon that issue. After acquiring it, it was his duty, not as soon as possible, to transmit information of it to the defendant, but to do it with reasonable promptness. He was not bound the first day or the next, necessarily, to give notice, but he was to give notice within a reasonable time; and it is for you to say, upon a consideration of all the circumstances of the case, whether he did within a reasonable time after acquiring such knowledge, send the letter of May 23d. It might be reasonable under one state of facts; it might be unreasonable under another. What might be very great diligence under one set of circumstances might be very dilatory under another. Now, first, you are to determine when he really acquired the knowledge. I am not going to recapitulate the testimony. It is claimed upon his part that he did not acquire the knowledge until the close of the examination by the expert, and that was only within a day or two of the time of mailing the notice; and so, testimony has been given to show that such examination commenced on the first of April and was continued until the latter part of May. On the other hand it is claimed that he must have acquired knowledge much earlier than this. Now there is a circumstance of some significance. It is hardly to be supposed that this Receiver, holding an official trust, would retain in his employ a cashier after he had become satisfied that by the dishonesty or the fraud of that cashier the bank had sustained serious loss. He did retain him until the second day of March. And it may be that while he and those associated with him were entirely satisfied that there had been irregularities, and even perhaps that there had been frauds on the part of the president, they were not aware of any specific acts which could be designated as fraudulent or dishonest on the part of the cashier until the investigation had progressed for a considerable length of time. On the other hand, you have heard the plaintiff's testimony

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as given in depositions taken in the West. Various 559
extracts have been read and it is insisted upon the
part of the defendant that he must have known of
these acts as early as the early part of February,
1892. Now, I charge you as a matter of law, that
if the facts were as they were assumed to be at the
outset of this trial, that is, that the discovery was
made early in February and notice was not given
until July, that was not notice with reasonable
promptness. And I do not know but that I should
charge you as a matter of law that if the fact were
discovered in the early part of February and notice
was not given until the latter part of May, that was
not notice given with reasonable promptness. But
if you come to the conclusion that the discovery was 560
not made until the middle or latter part of May,
then, in view of the situation of the plaintiff you
may reasonably come to the conclusion that he ex-
ercised proper diligence in sending the notice. Now,
upon this question there is some evidence derived
from the letters and the conduct of this defendant
itself. On the first of July it received a detailed
statement of all the transactions in which it was
insisted that the cashier had been guilty of fraudu-
lent or dishonest acts; and in the affidavits setting
out the facts the plaintiff stated that immediately
after his appointment he was advised that the
cashier was thought and believed to have issued
certificates of deposit without authority and 561
to have made false entries upon the books
of the bank; and he stated further that "the
nature, extent, amount and circumstances connected
with said wrongful acts" came to his knowledge
within the last six months, to wit, since the first of
February, 1892. Well, although he does not say
specifically when, it is somewhat significant that
after receiving those statements from the plaintiff
the defendant never made any complaint, never sug-
gested in his correspondence that there had been a
breach in the obligation to give notice within a rea-
sonable time; and down to as late as the 25th of

562 September, as appears by its letters in evidence here, it was promising to make further examinations and investigate the case upon its merits. Now, of course, this is not conclusive evidence; it may not be very controlling evidence; but it is some evidence tending to indicate that the defendant's officers themselves did not think that the plaintiff had been guilty of unreasonable delay within the provisions of the policy in sending the notice. Now, gentlemen, if this notice was not given conformably to the condition of the bond, the plaintiff is not entitled to recover, however unmeritorious this position may be in point of morals, however dishonorable it may be on the part of this defendant. It is a part of the
 563 contract that the defendant was entitled to notice, and the defendant is entitled to avail itself of the breach of the condition; and upon this issue, as upon the issue whether the acts of the cashier were dishonest or fraudulent, the burden of proof is with the plaintiff, and you must be satisfied by a fair preponderance of evidence that it has fulfilled the terms of the condition, construed as I have construed it to you.

It also is a condition of the bond that a written notice of claim should be given within a reasonable time after the discovery of the facts and circumstances showing the liability of the defendant. This condition means that after the loss has been definitely ascertained and the facts known which show
 564 that the defendant has become actually liable upon the bond the notice shall be given in writing with reasonable promptness thereafter. Now, this notice was given, the only way it could be given practically, by mail on the 24th of June.

A Juror: I thought it was the 23d of May.

The Court: The 23d of May was a general notice, but the notice of claim under the policy, or what is equivalent to proof of loss in a fire policy, was given on the 24th of June and received by the defendant on the first of July. Now, if it is a fact that the

plaintiff was engaged more or less in consultation with the United States Attorney and with the criminal authorities and that his circumstances and situation were such that it could not be reasonably expected of him that he should make out this formal claim and send it before the time when he did so, then you can find the notice was given within a reasonable time and in compliance with the condition of the policy. This condition, like the other, affords a legitimate defense, even though you should think it an unconscionable defense. It is a legitimate defense because it was one of the things agreed to on behalf of the bank, which was secured by the bond. 565

Now, gentlemen, if you find on these issues in favor of the plaintiff, the plaintiff is entitled to a verdict to the full amount of this bond, with interest from the first of October, 1892. A defense has been interposed to which I must call your attention. It is said that this bond of indemnity was obtained upon an application which was certified to by the bank itself, and that in the application facts were misrepresented and facts were concealed with fraudulent intent on the part of the bank; therefore, that the bond is void. The application was accompanied by a certificate of Collins, the president of the bank. The only knowledge of any facts which ought to have been communicated, or were misrepresented, the only knowledge which the bank possessed at the time that application was made was the knowledge of Collins himself. Ordinarily a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agents; but in this case all these transactions, if there were any transactions of a fraudulent and dishonest character on the part of the cashier, were transactions for the benefit of Collins and he was a participator in the fraud, and under those circumstances the law does not infer that the agent or the officer will communicate the fact to his principal, the corporation, and under such circumstances the cor- 566 567

568 poration is not bound by his knowledge. So this defense melts away and there is nothing of it whatever.

Now, gentlemen, it is very desirable that you should be able to reach a just conclusion in this case. It has occupied a large amount of our time. It has seemed to me an unnecessarily large amount of time. We have had here expert bookkeepers, for the defendant and the Receiver, who made a full examination of the books and papers of this bank, and it does seem as though there might have been a concession as to the many facts which it has required a great deal of our time to ascertain from the evidence. It is a case of some interest and some importance. The fact that the defendant is an insurance company, or an indemnity company, which it is more strictly, is not to be taken to its prejudice. It is to have the benefit of any just considerations to the same extent that a private individual would.

569 You may take the case, and I hope you will be able to agree speedily upon a verdict.

A Juror: May I ask a question on a point of law? If they found out the fraud on the second day of March and notified them on the 23d day of May, would that be, in law, a notice "as soon as practicable."

The Court: No. I should charge in reference to that, that that is a question for you to determine. It is a question of fact and not a question of law.

570 The Juror: I misunderstood. I thought it was a question of law.

Mr. Strong: I desire an exception to this.

The Court: Yes.

Another Juror: When was the examination of O'Brien, in which he declined to answer?

Mr. Mitchell: It was this year—this past summer.

The Juror: 1894?

Mr. Mitchell: 1894.

The Juror: Was he then in San Diego?

Mr. Mitchell: Yes.

Mr. Strong: With reference to that, right here,

I would ask your Honor to charge that it appears in evidence, or is claimed by the plaintiff, that an indictment has been found against Mr. O'Brien, and that there is no presumption to be taken, upon such refusal to testify, against him, and especially not against this company. 571

The Court: I don't know whether it appears that any indictment was found.

Mr. Strong: It appears in evidence that the plaintiff offered, so that he has claimed that an indictment was found. It has been testified two or three times that he appeared before the Grand Jury.

The Court: I think you objected to the evidence.

Mr. Strong: Your Honor let it in. The answer was received. 572

The Court: However that fact may be, gentlemen, it does not follow necessarily, because Mr. O'Brien declined to testify, that he had been guilty of dishonest and fraudulent acts.

The Juror: There is one other question. Do I understand that the expert of the company, of the indemnity company, found that the credit of Collins, on the night of the 10th or 11th of November, the credit in the individual balance book, was \$11,000?

The Court: I think more.

Mr. Willcox: \$11,000.

The Court: There was always a balance to his credit on the books. 573

The Juror: Then what was the condition of Collins' account on the 12th of October, before these —

The Court: \$98,000 to his credit.

The Juror: That is on the individual balance book, as I understand it?

The Court: Yes.

The Juror: There seem to have been two books.

The Court: They are the same. The books will tally, of course.

The Juror: I have not quite so understood it, be-

574 cause subsequent investigation of Collins' account shows that he owed \$300,000 which did not appear on the ledger at all.

The Court: The theory is that his account was credited with a large number of items which were improperly credited.

The Juror: But there was \$300,000 of improper items. Now, when the bank closed, how did Collins stand?

Mr. Willcox: About \$11,000 to his credit.

The Juror: Does the \$11,000 on the individual balance book correspond with the account on the ledger?

575 Mr. Strong: I think there is no doubt the two corresponded always.

The Court: The books would correspond, of course. Otherwise what would the Bank Examiner say when making his periodical investigation?

The Juror: There must be great looseness somewhere in the books which would not show this enormous indebtedness.

The Court: The looseness was not in the books. The looseness was outside of the books, if there was any looseness anywhere.

576 The Juror: Are we permitted to go outside the books at all? Because to my mind the fact that Collins owed this enormous sum of money and \$300,000, as Mr. Mitchell stated yesterday, it weighs with me that there was a tremendous defalcation which could not have been unknown to somebody; but we get no evidence that it was there. They put in a statement here, as I understand it, that Collins owed the bank \$370,000.

The Court: \$340,000.

Mr. Strong: As the Receiver claimed as the result of his investigations.

The Juror: But the bookkeeper testified that there was no other account of Collins in the books than the one from which he made his inferences.

The Court: They corrected his account.

The Juror: \$10,000.

The Court: They corrected his account by ascertaining what items were credited to him to which he was not entitled. 577

Mr. Strong: In their opinion.

The Court: Yes, in their opinion. After investigating they found that he had been credited with about \$340,000 more than he was entitled to.

Mr. Strong: In regard to the charge which your Honor gave, I desire to except to that portion of your Honor's charge which assumed that the paper used here in New York to obtain those loans from the Western National Bank and the United States National Bank was the property of the California National Bank. As I remember the testimony, that bank was endorser on that paper; that is, it would be contingently liable. It was bank paper rediscounted here. The testimony was as to what the paper actually was. It was paper made by some of the directors and endorsed by the bank; so that the bank would be only contingently liable. 578

The Court: I understood it to be customers' paper. They gave a description of some of the paper, the irrigation company, &c.

Mr. Strong: That was collateral. The paper discounted was paper made by the bank. I ask to except to what your Honor said in regard to its being satisfactory to see the telegrams addressed by Mr. Collins to Mr. O'Brien, on the ground that it has not been shown that those were telegrams received by Mr. O'Brien or acted upon by him, and it was upon that ground that they were rejected by your Honor; whereas what your Honor said to the jury necessarily assumes that they were the telegrams which O'Brien had acted on. 579

The Court: I will withdraw my observations to the jury in respect to those telegrams.

Mr. Strong: I desire to except to that portion of your Honor's charge in which you stated, in various forms, that it was not sufficient that the plaintiff had suspicion in regard to the acts of Mr. O'Brien; that he was not bound to give preliminary notice

580 until he became satisfied that O'Brien had committed such acts.

The Court: You are entitled to an exception to that part of the charge.

Mr. Strong: As I remember, your Honor first said that the policy was equivalent to an insurance policy.

Mr. Strong: I except to what your Honor said in regard to the plaintiff's consultation with the United States District Attorney affording ground for the jury to infer reasonable diligence, on the ground that the plaintiff could not extend the time within which he should notify us by employing an attorney living in another place.

581 The Court: All I mean to be understood as saying in respect to that is this: The jury are to take into consideration all the circumstances of the situation, and I will not place any stress upon any one particular fact. You are to take all the circumstances of the Receiver's situation into consideration.

Mr. Strong: And lastly, your Honor's instructions, that because Mr. Collins was the offender, if there were any offender, therefore his knowledge did not bind the bank.

The Court: You are entitled to an exception.

A Juror: There is one other point that occurred to me. Is it admitted on both sides that the securities or the method by which the money was obtained, 582 the \$45,000—that it was entirely the property of the bank? was not some of it raised on Collins' own notes?

The Court: Read the evidence of the cashier.

The Juror: I understood your Honor to say that that whole money was raised on what was the property of the bank.

The Court: I so understood it.

The Juror: I understood it differently.

The Court (to Mr. Paige): Was this proof of claim offered in evidence (indicating paper)?

Mr. Paige: Yes, sir. These are the two notes.

Mr. Strong: Both made by the bank?

Mr. Paige: Yes. Both made by the California National Bank. 583

The Court: The Western National Bank, the note for \$20,000, seems to have been collateral to bills receivable, aggregating \$36,250. The details are not given.

Mr. Paige: And the note was made by the bank itself.

The Juror: They would then be the rediscounted notes of the bank; what they call rediscounts.

The Court: It was the note of the bank itself, with its own paper as collateral.

Mr. Strong: We except to that statement.

The testimony of the witness Hopkins is read, from pages 67 and 68 of the stenographer's minutes. 584

The Court: Are you satisfied?

The Juror: Yes, sir. Now, the Western National Bank.

The testimony of the witness is read, from pages 60, 61 and 62 of the stenographer's minutes.

The Juror: I am satisfied.

By the Court: Any further exceptions?

Mr. Strong: No.

The Court: The defendant's requests are denied, except as covered by the charge.

Mr. Strong: The defendant excepts separately to each one. 585

The jury retired.

After being out about four hours the jury came into the court room.

The Court: I have been informed, gentlemen, by the bailiff, by whom I sent for information, that you have not as yet agreed upon a verdict. Is that so?

The Foreman: Yes, sir.

The Court: I am obliged to leave the Court House

586 at half-past three, and I thought possibly you might desire some further instructions of the Court; if you do, now is the time to have them.

A Juror: I don't think we require any further instructions, but I think we have made up our minds we cannot agree on the case. We have been discussing it for two or three hours.

The Court: I shall have to send you back. It is very unfortunate to have a disagreement in this case after the length of time that has elapsed in the trial; of course, it would be equally unfortunate to have an agreement against the conscience of any intelligent jurymen; but you must make a sincere effort to agree in this case.

587 A Juror: I would like to ask if we could compel the Surety Company to pay unless we found fraud and dishonesty.

The Court: You don't want any further instructions upon that subject.

The Juror: I would like to know if finding that the company was obliged to, is equivalent to saying that Mr. O'Brien was a criminal.

The Court: It is equivalent to saying that he was guilty of fraud and dishonesty. If that is criminal, you ought to know that as an intelligent man, as well as I.

The Juror: Would a verdict here be quoted against him in California.

588 The Court: It might be quoted by word of mouth, but it would not conclude him upon any trial.

Mr. Strong: It would conclude him in a trial between us and him, would it not?

The Court: If you sue him to get back your indemnity it would conclude him, of course, if you have given him notice of the pendency of this suit.

The Juror: And guilty of a crime, do I understand?

The Court: No; not necessarily guilty of a crime.

The Juror: I think I don't get the idea.

The Court: Fraud is not always crime. Dishonesty is not always crime.

Mr. Strong: (Rising to speak.)

589

The Court: I don't want any discussion.

The Juror: Would the fact that we compelled the Surety Company to pay because of O'Brien's fraud and dishonesty amount to the right of the company to sue him for fraud and dishonesty and what would be the penalty in that case?

The Court: They would recover the amount they had to pay for it.

The Juror: There would be no criminal penalty?

The Court: He would not be concluded in any criminal case, no. Your verdict here would not be evidence upon a criminal trial against him.

The Juror: Not at all, in any sense?

Another Juror: In coming to our conclusions are we forced to exclude all the evidence of Mr. O'Brien —of his knowledge of what was going on in the bank, other than the occurrences of the 13th and 14th of October? 590

The Court: No.

The Juror: We can look into anything that he did before that time that has a bearing?

The Court: Oh, yes.

Mr. Strong: We except to that.

The Juror: We would like to know how Mr. O'Brien became indebted to the bank.

The Court: We can't clear that up now without going into the evidence.

The Juror: I think the sore point with some of the jurors is that to compel the company to pay is virtually saying that Mr. O'Brien has been guilty of a criminal act. 591

The Court: I should say if he has not been guilty of a dishonest or fraudulent act the company ought not to pay. If he has, he ought to suffer the consequences. But there are no criminal consequences against him depending upon this verdict. It is purely a question between the company and the bank.

The Juror: The mere fact that the action he took

592 partook of fraud and dishonesty, then would that weigh?

The Court: Weigh, how?

The Juror: Weigh to compel the company to pay. I made a distinction between what Mr. O'Brien may have done that was wrong, or may have done with the deliberate idea to commit a crime; wrong as an improper and unwise and injudicious act.

The Court: Well, I suppose any intelligent man understands that his friends and neighbors often do dishonest things which are not criminal, with no purpose of committing a crime. There are a great many sorts of frauds that are not crimes.

593 The Juror: Then I would ask, would this be counted under the head of a crime?

The Court: I don't know whether it would or not. It is not the inquiry here at all. It has nothing to do with it.

Mr. Strong: I ask your Honor to charge that if Mr. O'Brien did what the plaintiff claims, it would be a crime.

The Court: I don't think there is any use in sending this jury out. It is apparent that this case is likely to be decided upon considerations which are outside of those which legitimately arise from the evidence.

A Juror: Well, your Honor, we would like to have another opportunity to see if we can come to a decision.

594 The Court: Well, you may retire and see if you can.

The Juror: We will do our best.

Mr. Strong: Will your Honor give them that charge?

The Court: No, I decline.

Mr. Strong: We except.

The jury again retired, and in a short time returned the following:

Verdict for the plaintiff. \$16,847.50.

Mr. Williams: I am not familiar with the practice 595
in this Court. Shall we move now to set the verdict
aside as being contrary to law, and against the
weight of evidence and on the exceptions?

The Court: You do not get any advantage upon
an appeal by a motion for a new trial. You can
make your formal motion and I will formally deny
it and give you an exception.

Exhibit "A."

PROOF OF CLAIM.

596

Being described as:

STATE OF CALIFORNIA, }
County of San Diego, } ss.:

Before the undersigned authority personally came
Frederick N. Pauly, who being by me first duly
sworn on oath, says:

That heretofore, on the 18th day of December,
A. D., one thousand eight hundred and ninety-one,
he was, by the Honorable E. S. Lacey, Comptroller
of the Currency of the United States, appointed
Receiver of the California National Bank of San
Diego, California, a banking corporation organized
and existing under the National Bank Act, at said
City and State; and has ever since remained and
now is the Receiver of said bank. 597

That immediately after his appointment as such
Receiver being advised that *George N. O'Brien*, the
then cashier of said association, was thought and
believed to have issued certificates of deposits with-
out authority, and to have made false entries upon
the books of the bank; and to have been guilty of
fraudulent conduct in connection with the discharge
of his duties as such cashier, having employed an
expert accountant to enter upon an examination of
the books of said bank; that such an investigation

599 of the books of said bank show, and affiant avers the truth to be that said G. N. O'Brien while cashier of said California National Bank of San Diego, on the 22d day of September, 1891, as such cashier, combined and conspired with J. W. Collins, the then president of said bank to defraud said bank; and did then and there in furtherance of such conspiracy, issue in the name of said bank and deliver to said Collins two certain certificates of deposit numbered respectively 6800 and 6801; the first thereon certifying that said Collins had on deposit in said bank seventy-five hundred dollars; the second certifying that said Collins had on deposit in
600 sums payable to said Collins upon presentation of said certificates, when in truth and in fact, neither at the date of issuance thereof, nor at any time subsequent thereto, did Collins have on deposit in said bank the amounts in said certificates mentioned, or any part thereof, and the same were issued and delivered to said Collins by said G. N. O'Brien, cashier of said bank, without any consideration being paid therefor to said bank, and were so issued by said O'Brien solely for the purpose of loaning the credit of said bank to said Collins; all of which facts were well known to said O'Brien when he issued the same.

That said Collins loaned and discounted said certificates of deposit and each of them, and appropriated the proceeds thereof to his own use; and suit thereon is now pending against the undersigned Receiver on account thereof.

That on the 13th and 14th days of October, 1891, said G. N. O'Brien being the cashier of said bank, and as such cashier having charge and supervision of the books of said bank, made entries of the deposit tags, and caused the same to be entered by a bookkeeper in the books of the bank of credits in favor of J. W. Collins of the sum of forty-five thousand dollars without the said Collins paying any consideration therefor to said bank, and without be-

ing entitled to said credits, as he, the said O'Brien, 601
then and there well knew.

That afterwards, on the 31st of October, 1891, the
said G. N. O'Brien, as such cashier, then being in
charge of the books of said bank and having author-
ity as such cashier to make the entries hereinafter
stated, did, on said day, on the deposit tags of said
bank, enter two credits to J. W. Collins, each of
ten thousand dollars, and caused the same to be en-
tered by a bookkeeper in the books of the bank with-
out the said J. W. Collins paying any consideration
therefor to said bank and without being entitled to
said credits, as he, the said G. N. O'Brien then and
there well knew, and as such cashier suffered and
permitted the said Collins to check out of said bank 602
and apply to his own use the whole of said sum of
twenty thousand dollars so wrongfully and erro-
neously credited to him as aforesaid by said G. N.
O'Brien.

Affiant further says that neither of the above
sums nor any part thereof have ever been returned
or repaid to said bank.

Affiant says that the nature, extent, amount and
circumstances connected with said wrongful acts of
said G. N. O'Brien as aforesaid have come to his
knowledge and to the knowledge of the said Cali-
fornia National Bank of San Diego within the
last six months, to wit, since the first of February,
1892.

That said G. N. O'Brien is not entitled to any 603
credits and said bank is not indebted to him in any
sum.

That at the date of the suspension of said bank,
the account of said G. N. O'Brien was overdrawn
and he was at that date indebted to the bank.

That the above and foregoing statements as to the
wrongful, unlawful and fraudulent acts of said G. N.
O'Brien and cashier of said bank between the first
of July, 1891, and the 12th day of November, 1891,
said last date being the date of the suspension of
said bank, includes all the money misappropriated,

604 wrongful and improper entries and fraudulent and wrongful conduct upon the part of said O'Brien, which have come to the knowledge of affiant, and that affiant is now informed and believes constitute a true and correct statement of the account between said bank and said G. N. O'Brien, its cashier.

FREDERICK N. PAULY.

Subscribed and sworn to }
before me this 24th day }
of June, A. D., 1892. }

W. D. BLOODGOOD,
Notary Public in and for
San Diego County.

605

Exhibit "I."

"Deposit Slip U. S. National Bank, N. Y.," October
13, 1891, being described as

Deposited with
The California National Bank
of San Diego, 10/13 1891.

By T/D J. W. C. 10/12
Credit of J W Collins

U. S. Nat. N. Y. 24500

606

Exhibit "J."

"Deposit Slip Western National Bank," N. Y.,
October 13, 1891.

Deposited with
The California National Bank
of San Diego, 10/13 1891

By J W C T/D 12
Credit of J W. Collins

Westn Nat. 20000

Exhibit "K."

607

"Deposit Slip U. S. National Bank, N. Y.," October
14, 1891.

Deposited with
The California National Bank
of San Diego. Oct. 14, 1891.
By More U. S. Nat.
Credit J. W. Collins.
T/D J W 10/13 500

608

Exhibit "L."

"Deposit Slip First National Bank of Chicago
and Western National Bank of New York," October
31, 1891.

Being described as

Deposited with
The California National Bank
of San Diego. 10/31.
Credit of J. W. Collins.

Check 1st Chic.....	10,000
West. N. Y.....	10,000
	<hr/>
	20,000

609

616

617

618

Exhibit "M."

Designated as Teller's Cash, September 22, 1891.

CALIFORNIA NATIONAL BANK OF SAN DIEGO, SEPT. 22, 1891.

CREDITS.

DEBITS.

DEPOSITS.		CHECKS.		GENERAL ACCOUNTS.	
GENERAL ACCOUNTS.		GENERAL ACCOUNTS.		GENERAL ACCOUNTS.	
155 05		52 45	23,496 76	Loans.....	5,610 00
199 60		54 75	62 90	Certificates 6667	100
93 00		57 96	26 90	Certificates 6737	50
12,250 00		148 58	189 59	Expense, Newhall Seal	22 50
339 50		129 60	19 66	Bullion Mex.....	1 88
6,145 75		26 25	36 15	Interest—	
30 82		278 50	28 20	More Co. to	988 94
63 65		18 02	93 81	Bk. Cal.	225
305 30		249 60	4,186 64	Exchange—	
84 25		14 95	1,141 15	Bank Debits—	
486 05		22 43	247 90	Hanover Dep. Dunlop.....	12,250 00
193 50		2,345 40	25 50	Escondido	2487 4 50
186 00		120 70	152 05	2483	55 50
194 07		43 20	88 74	State	2477 7 70
167 20		77 60	153 95	State 15,711.....	67 70
233 65		18 33	323 32	Pacific from N. Y.....	152 57
507 25		162 50	2,493 48	Nat. Com. "Chicago".....	7,500 00
146 50		705 77	1,662 87	Union Nat.....	1,500 00
680 25		198 04	187 00		
30 00		79 60	156 76		
		99 45	446 93		
		112 90	183 17		
		1,021 00	249 07		
		57 31	270 00		
		31 20	124 26		
		2,066 50	5,159 26		
		80 43	813 54		
			25 00		
			8,302 62		
22,501 39					
76 52					
171 50					
212 81					
554 73					
37 00					
52 70					
	National Park	9/11			

183 50	Bk. Cal. 9/11.....	225	441 00	42,044 86	Humbolt, Ia., C/D.....	2,483 00
704 97	Bank credits.....	4	284 02	964 60	Checks.....	42,810 73
95 20			573 00	200 27		
37 00	Nevada 9/16.....	72 15	1,313 97	1,05 00	Remittances.....	2,861 93
213 00	9/19.....	41 04	192 50	91 00		65,141 25
408 40	First S. F.....	9/19	183 55	42,765 73		
32 54			54 96	45 00		
25,341 26	Nat. Com.....	9/17	1,000 00	42,810 73		
482 80	Consol.....	9/19	1,285 27			
384 09	State.....	9/19	1,326 55			
378 79	Pervia.....	9/21	2,483 00			
6,540 68	Deposits.....		30 40			
290 00	X More.....		50 82			
40			6,001 85			
189 50			5,049 25			
83 85			400 10			
33,483 37			23,496 75			

MEMORANDA.

Balance brought forward.....	125,874 72	Bank Bills in vault.....	50,700 00
To-day's receipts.....	58,449 66	" " out ".....	2,639 00
Amount.....	184,324 38	Gold in vault.....	20,000 00
To-day's payments.....	65,141 25	Silver, in vault.....	8,287 50
		Gold coin, out vault.....	900 00
269 67	119,183 13	Silver coin, out vault.....	1,175 00
73 43	8 00	Silver coin (fractional) in vault.....	1,215 80
343 10	119,191 13	Silver coin (fractional) out vault.....	131 15
		Nickels & Pennies in vault.....	27 10
		Check & other cash items.....	13,238 15
		Mexican Dollars, \$1,680.....	1,344 00
	343 10	Total Cash.....	119,117 70

622

Exhibit "N."

Being described as "Certificate of Deposit 6800,
September 22, 1891, \$7,500."

THE CALIFORNIA NATIONAL BANK, SAN DIEGO, CAL.
7500/00 Dollars. Sept. 22, 1891.
No. 6800.

J. W. Collins has deposited in this bank Seventy-five hundred dollars, payable to the order of same on return of this Certificate properly endorsed.

(Signed) G. N. O'BRIEN, Cashier.

Endorsed: J. W. COLLINS.

623

Exhibit "O."

Being described as "Certificate of Deposit 6801,
September 22, 1891, \$8,500."

CALIFORNIA NATIONAL BANK, SAN DIEGO, CAL.
8500/00 dollars. Sept. 22, 1891.
No. 6801.

J. W. Collins has deposited in this bank Eighty-five hundred dollars, payable to the order of same on return of this certificate properly endorsed.

(Signed) G. N. O'BRIEN, Cashier.

Endorsed: J. W. COLLINS.

624

Exhibit "P."

Being described as "Check of J. W. Collins, September 22, 1891, \$16,000."

SAN DIEGO, CAL., Sept. 22, 1891. No.
THE CALIFORNIA NATIONAL BANK OF SAN DIEGO, CAL.
Pay to the order of C/D 6800-6801, \$16000/00.
Sixteen thousand dollars.

J. W. COLLINS.

Exhibit "Q."

625

Being described as "Check of J. W. Collins," May
25, 1891, \$25,000.

SAN DIEGO, May 25, 1891.

THE CALIFORNIA NATIONAL BANK OF SAN DIEGO, CAL.

Pay to the order of C/D 6479-80-81, \$25,000/00.
Twenty-five thousand dollars.

J. W. COLLINS.

Exhibit "R."

626

Being described as "Check of J. W. Collins, July
20, 1891, \$20,000."

SAN DIEGO, CAL., July 20, 1891.

THE CALIFORNIA NATIONAL BANK OF SAN DIEGO, CAL.

Pay to the order C/D 6633, \$20,000. Twenty
thousand dollars.

J. W. COLLINS.

Exhibit "S."

627

Being described as "Check of J. W. Collins, Sep-
tember 16, 1891, \$15,000."

SAN DIEGO, CAL., Sept. 16, 1891. No.

THE CALIFORNIA NATIONAL BANK OF SAN DIEGO, CAL.

Pay to the order C/D 6780, \$15,000. Fifteen
thousand dollars.

J. W. COLLINS.

628

Exhibit "T."

Being described as "Note J. W. Collins, August 22, 1891, at 6 mos., \$51,038.35."

\$51,038.35.

SAN DIEGO, CALIF., August 22, 1891.

Six months after date I promise to pay to the order of the California National Bank of San Diego, in gold coin of the United States, Fifty-one thousand thirty-eight and thirty-five one hundred Dollars, for value received, with interest at 10 per cent. per annum from date until paid.

Payable at the California National Bank, San Diego, California.

629

(Signed) J. W. COLLINS.

(California Natl. Bank

No. 5755½

Due Feb. 22 Spreckels.

San Diego, Cal.)

Exhibit "U."

Being described as "Note J. W. Collins, September 15, 1891, at 3 mos., \$6,659."

\$6,659.00 SAN DIEGO, CALIF., Sept. 15th, 1891.

630

Three months after date, I promise to pay to the order of the California National Bank of San Diego, in gold coin of the United States, Sixty-six hundred and fifty nine Dollars, for value received, with interest at 12 per cent. per annum from maturity until paid.

Payable at the California National Bank, San Diego, California

(Signed) J. W. COLLINS.

(California Natl. Bank

No. 5841

Due December 15

San Diego, Cal. Spreckels)

Exhibit "V."

631

Being described as "Check J. W. Collins, November 9, 1891, \$19,500."

SAN DIEGO, CAL., 11/9, 1891.

THE CALIFORNIA NATIONAL BANK OF SAN DIEGO, CAL.

Pay to the order of Calif. Nat. Bank, Nineteen (\$19,500) thousand five hundred dollars.

J. W. COLLINS.

(Stamped on face, Paid Feb. 8, 1892, Calif. Natl. Bank, San Diego, Cal.)

632

Exhibit "W."

Being described as "Deposit Slip, March 3, 1891."

Deposited with
The California National Bank
of San Diego. 3/25, 1891.

By
Credit of J. W. Collins.
Set to Nat. Bank 25,000

633

Exhibit "X."

Being described as "Deposit Slip National Park Bank of N. Y.", June 6, 1891.

Deposited with
The California National Bank
of San Diego, 6/6, 1891.
By Teleg. Nat. Park Bk.
Credit J. W. Collins.

Check \$20,000

Exhibit "Y."

Being described as package of Deposit Slips not printed.

Exhibit "AA."

Being described as Note of D. D. Dare, J. W. Collins and S. G. Havermale, National Park Bank of N. Y., at 4 months, April 1, 1891, \$25,000.

\$25,000.

SAN DIEGO, CAL., Apl. 1, 1891.

- 635 Four months after date, we jointly and severally promise to pay to the National Park Bank of New York City, N. Y., or order Twenty-five Thousand Dollars, for value received, with interest at six (6) per cent. per annum from maturity.

Payable at the National Park Bank, New York, Aug. 4.

D. D. DARE.

J. W. COLLINS.

S. G. HAVERMALE. (Paid.)

Endorsed:

SAN DIEGO, CAL., April 1, 1891.

- 636 For value received, we hereby guarantee the payment of within note at maturity, with interest at six per cent. per annum after due until paid, waiving notice, protest and diligence in collecting, and hereby agree to pay all cost and expenses paid or incurred in collecting this note.

9,214.

CALIFORNIA NATIONAL BANK, San Diego, California,
Per G. N. O'BRIEN, Cashier.

Exhibit "BB."

637

Being described as note California National Bank to
National Park Bank of N. Y., \$20,000, at 60
days from June 3, 1891.

\$20,000.

NEW YORK, 3 June, 1891.

Sixty days after date we promise to pay the National Park Bank of New York, or to the order of the cashier, at the banking house of said bank, twenty thousand dollars in funds current, at the New York Clearing House, for value received, having deposited with said bank as collateral security for the payment thereof a promissory note made by J. W. Collins and S. G. Havermale for \$25,000, at 90 days from June 3, and endorsed by this Bank, and secured by 30,000 bonds of San Diego Cable R'way Co., which securities or any part or portion thereof, or any security which may subsequently be lodged with the Bank in lieu of any of above

hereby authorize said Bank or its President or its Cashier to sell without notice at the Board of Brokers or at a public or private sale, at the option of said bank or of its president or of its cashier, in case of the non-performance of the above promise applying the proceeds to the payment of this note, including interest, applying the surplus, if any, to the payment of any and all other demands due or not due, held by the said bank against the undersigned, and accounting to for the surplus if any. In case of deficiency promise to pay to said Bank the amount thereof, forthwith after such sale, with legal interest.

And we further agree that in case of depreciation in the market value of the securities herewith pledged or which may hereafter be pledged for this loan, we will make a payment on account, or lodge additional collateral security, so that the market value of the collateral securities pledged shall always be at least per cent. more than the amount

640 unpaid of this note, and in default of such payment being made on account, or such additional collateral security being furnished within day after the day on which a call or notice therefor has been left at place of business, thereupon this note shall become due and payable, with full power and authority to said bank, its president or its cashier, to sell and dispose of the above named securities, and all such additional securities in the manner and way above provided, subject to rebate and interest for the unexpired term.

CALIFORNIA NATIONAL BANK OF SAN DIEGO.
Per J. W. COLLINS.

641

Exhibit "CC."

Being described as Note of J. W. Collins, William Collier, S. G. Havermale and D. D. Dare to National Park Bank of N. Y. at 90 days from August 4, 1891, \$25,000.

\$25,000.

SAN DIEGO, CAL., Aug. 4, 1891.

642 Ninety days after date we promise to pay to the order of National Park Bank, Twenty five thousand dollars, at National Park Bank, N. Y., value received with interest, at the rate of six per cent. per annum from date, having deposited with said bank, as collateral security which said security—or any part thereof—hereby give the legal owner or owners, authority to sell on the authority of this note, or at any time thereafter, or before, in the event of said security depreciating in value, at public or private sale, at discretion, without advertising the same or giving any notice, and to apply so much of the proceeds thereof to the payment of this note, as may be necessary to pay the same, with all interest due thereon; and also to the payment of all expenses

attending the sale of said Collateral security; and in case the proceeds of the sale of said collateral security shall not cover the principal, interest and expenses promise to pay the deficiency forthwith after such sale, with interest at per cent. per annum. And it is hereby agreed and understood that if recourse is had to said collateral, any excess of collateral upon this note shall be applicable to any other note or claim held by said owner or owners against , and in case of any exchange of, or addition to the collaterals above named, the provisions of this note shall extend to such new or additional collateral. 643

J. W. COLLINS.

WM. COLLIER.

S. G. HAVERMALE.

D. D. DARE.

By H. E. O'BRIEN, his attorney
in fact. 644

Endorsed:

SAN DIEGO, CAL., Aug. 4, 1891.

For value received, we hereby guarantee the payment of within note at maturity, with interest at 6 per cent. per annum, after due until paid, waiving notice protest, and diligence in collecting and hereby agree to pay all costs and expenses paid or incurred in collecting this note.

CALIFORNIA NATIONAL BANK, SAN DIEGO, CALIFORNIA. 645
Per G. N. O'BRIEN, Cashier.

Exhibit "DD."

Being described as Note California National Bank to Western National Bank of N. Y., at 90 days from October 12, 1891, \$20,000.

\$20,000.

NEW YORK, Oct. 12, 1891.

Ninety days after date, for value received, we promise to pay to J. W. Collins or order, at the

- 646 Western National Bank of the City of New York, twenty thousand dollars, with interest at the rate of per cent. per annum, said interest being payable having deposited with said bank as collateral security for payment of this note, reference being had to the endorsement hereon and in accordance with its terms, the following property, viz.: Bills receivable aggregating \$36,250, the market value of which is now \$ with the further right to call for additional security, in case there should be a decline in the market value thereof, and on failure to respond according to the tenor of this obligation, said obligation shall be deemed to be due and payable without demand or
- 647 notice, with full power and authority to said bank to sell and assign and deliver the whole of the above mentioned security or any part thereof, or any substitute therefor, or any additions thereto, at any brokers' board or at public or private sale, at the option of said bank or its president, or its cashier, or its or their assigns, on the non-performance of this promise, or the non-payment of any of the liabilities mentioned above at any time or times thereafter, without demand, advertisement or notice; and after deducting all expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales, so to be made, to pay any, either or all of the above mentioned liabilities,
- 648 as said bank or its president, or its cashier, or its or their assigns shall deem proper, returning the over-plus to the undersigned.

CALIFORNIA NATIONAL BANK OF SAN DIEGO,
Per J. W. COLLINS, President.

(Endorsed)—Pay to the order of the Western National Bank and further agree to the terms and conditions of the collateral obligation entered into by the maker of the within note and waive notice, demand and advertisement and notice of any substitution of securities and for value received hereby guarantee the performance of the terms entered into by the maker of the said note. J. W. COLLINS.

Exhibit "EE."

Being described as proof of claim Western National
Bank of New York.

IN THE MATTER

OF

The Claim of THE WESTERN
NATIONAL BANK OF THE CITY
OF NEW YORK against the
CALIFORNIA NATIONAL BANK,
SAN DIEGO, CALIFORNIA.

650

STATE OF NEW YORK, }
City and County of New York, } ss.:

HENRY A. SMITH, being duly sworn, says: That he is the cashier of the Western National Bank of the City of New York and as such cashier has knowledge of the transactions between said bank and the California National Bank, lately doing business at San Diego, in the State of California.

I.—That on the 2d day of November, 1892, the Western National Bank sent to the California National Bank for collection the note for \$10,000 made by W. O. Havermale, which became due November 11th, 1891, which note, as deponent is informed and believes, was collected by the California National Bank, which holds the proceeds thereof as agent and in trust for the Western National Bank, together with the accrued interest on said note amounting on January 23d, 1892, to the sum of \$121.61. The total sum so held by the California National Bank as agent or trustee of the Western National Bank is ten thousand one hundred and twenty one and $\frac{61}{100}$ dol-

651

652 lars; no part of said sum has been paid or satisfied and there is no set-offs or counterclaims thereto, to the knowledge or belief of deponent, and said sum is subject to no deductions whatever, but is the property of the Western National Bank and is payable in full.

II.—That there is due to the Western National Bank from the California National Bank the further sum of twenty-one hundred and seventy-three and $\frac{59}{100}$ dollars, being the amount paid out by the Western National Bank on account of drafts and checks drawn by the California National Bank in excess of the amount deposited in the Western National Bank
653 to the credit of the California National Bank, together with interest on said sum from the 9th day of January, 1892, amounting in all to the sum of twenty-one hundred and ninety-three and $\frac{51}{100}$ dollars; no part of said sum has been paid or satisfied; and there are no set-offs or counterclaims thereto to the knowledge or belief of deponent.

III.—That there is due and owing to the Western National Bank from the California National Bank the further sum of seventy-five hundred dollars on account of certificate of deposit No. 6800, issued by the California National Bank and of which the Western National Bank is the holder and owner; no
654 part of said sum has been paid or satisfied and there are no set-offs or counterclaims thereto, to the knowledge or belief of deponent.

IV.—That on or about October 12th, 1891, in consideration of a time loan of twenty thousand dollars made by the Western National Bank to the California National Bank, the California National Bank made its certain promissory note in writing whereby it promised to pay to said Western National Bank ninety days after date the sum of twenty thousand dollars with interest; that no part of said sum has been paid except the sum of thirty-

two hundred and seventeen and $\frac{50}{100}$ dollars; there is 655
 now due and owing to the Western National Bank
 from the California National Bank on account of
 said note the sum of sixteen thousand eight hundred
 and eighty-three and $\frac{18}{100}$ dollars, as appears more
 fully in the statement annexed hereto and marked
 "Exhibit B"; no part of said sum has been paid or
 satisfied and there are no set-offs or counterclaims
 thereto to the knowledge or belief of deponent, ex-
 cept as hereinafter stated.

Deponent further says that of the bills receivable,
 aggregating thirty-six thousand two hundred and
 fifty dollars, deposited with the Western National
 Bank of the City of New York as collateral security
 for the payment of the above mentioned note of 656
 twenty thousand dollars, there has been collected
 the sum of one thousand dollars on a note of George
 W. Marston, due December 3, 1891, for one thousand
 dollars, and the sum of twenty-two hundred and
 seventeen and $\frac{50}{100}$ dollars on a note of William
 Collier and William C. Graham, due November 28,
 1891, for twenty-two hundred and fifty dollars, be-
 ing the amount of said note less the cost of collect-
 ing the same, which said amounts have been duly
 placed to the credit of the California National Bank
 on account of said loan, as will appear from the an-
 nexed statement.

That the balance of said collateral security held by
 the Western National Bank consists of the following 657
 notes:

D. D. Dare, due January 1, 1892, for \$5,500.

L. B. Howard, due December 20, 1891, for \$12,500.

Jamul Portland Cement Company, due November
 17, 1891, for \$5,000.

Deponent further says that said notes and each of
 them was duly presented for payment at the time
 and place they fell due, and that payment thereof
 was duly demanded, which was refused, whereupon
 said notes were duly protested for such non-pay-
 ment, and that said notes and each of them are now

658 worthless and of no value whatsoever, as deponent verily believes; that the note of William O. Havermale for \$10,000 due November 11, 1891, as deponent is informed and believes, has been collected by the California National Bank, the proceeds of which the California National Bank holds as agent or trustee for the Western National Bank as hereinabove set forth.

Deponent further says that the total amount due and owing to the Western National Bank from the California National Bank is thirty six thousand, six hundred and ninety-eight and $\frac{78}{100}$ dollars, as more fully set forth in the statement annexed hereto and marked Exhibit "C"; of said amount the sum of
 659 ten thousand one hundred and twenty-one and $\frac{61}{100}$ dollars is the property of the Western National Bank and is subject to no deductions whatever, but is payable in full.

H. A. SMITH, C.

Sworn to before me this 5th {
 day of March, 1892. }

CHAS. L. ROBINSON,

[SEAL.]

Notary Public,

Kings Co.

Certificate filed in N. Y. Co.

County Clerk's certificate as to qualification of
 Notary Public, attached, signed by Wm. J. McKenna, dated 7th day of March, 1892.
 660

—
 "A"

\$20,000

NEW YORK, October 12th, 1891.

Ninety days after date, for value received, we promise to pay to J. W. Collins or order at the Western National Bank of the City of New York, Twenty thousand dollars, with interest at the rate of per cent. per annum said interest being payable having deposited with said bank, as

collateral security for payment of this note, reference 661
being had to the endorsement hereon and in accordance with its terms, the following property, viz:

Bills receivable aggregating \$36,250, the market value of which is now \$ with a further right to call for additional security, in case there should be a decline in the market value thereof, and on failure to respond according to the tenor of this obligation, said obligation shall be deemed to be due and payable without demand or notice, with full power and authority to said bank to sell and assign and deliver the whole of the above mentioned security or any part thereof, or any substitutes therefor or any additions thereto, at any broker's board or at public or private sale, at the option of said bank or its President, or its cashier, or its or their assigns, 662
on the non-performance of this promise, or the non-payment of any of the liabilities mentioned above at any time or times thereafter without demand, advertisement or notice; and after deducting all expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales, so to be made, to pay any, either or all of the above mentioned liabilities, as said bank or its President or its cashier, or its or their assigns shall deem proper, returning the overplus to the undersigned.

CALIFORNIA NATIONAL BANK OF SAN DIEGO.

per J. W. COLLINS,

President. 663

Endorsed: Pay to the order of the Western National Bank and further agree to the terms and conditions of the collateral obligation entered into by the maker of the within note and waive notice, demand and advertisement and notice of any substitution of securities and for full value received hereby guarantee the performance of the promise entered into by the maker of said note.

"B."

WESTERN NATIONAL BANK.

NEW YORK, Feby. 18, 1892.

CALIFORNIA NATIONAL BANK,
San Diego, Cal.

Dear Sirs:

There is due us for interest on your time loan due Jan. 13, 1892, to date as follows, viz.:

	Date	For days at	per cent.	Dollars	cts.
	\$20,000 Oct. 12, 91				
(PP)	1,000 Dec. 15, 91	Geo. W. Marston		Due Dec. 3, 91.	
665	19,000				
				For \$1000	
(PP)	2,217.50 Jan. 9, 92	Win. Collier Margt. C.			
		Graham due Nov. 28, 91 for		2250.	
	16,782.50	36 6		100.69	
				16782.50	
		Total amt. due Feb. 18-92		16883.19	

Yours truly,
H. A. SMITH,
Cashier.

Exhibit "C."STATEMENT OF AMOUNT DUE AND OWING FROM THE
CALIFORNIA NATIONAL BANK TO THE WESTERN
NATIONAL BANK OF THE CITY OF NEW YORK:

There are two classes of claims, as follows, viz:

I. The California National Bank holds as trustee or agent for the Western National Bank the proceeds of the note of W. O. Havermale, due November 11th, 1891, together with interest thereon, subject to no deduction whatever and payable in full, being the property of the Western National Bank ----- \$10,121 67

II. Debts due and owing from the
California National Bank to the West-
ern National Bank:

667

Balance of time loan.....	\$16,782 50	
Overdraft in account.....	2,173 59	
Certificate of deposit No.		
6800	7,500 00	
Interest on above amounts		
to January 23d, 1892.....	121 02	\$26,577 11
		<hr/>
		\$36,698 78

Allowed

Balance on note.....	\$16,782 50
Overdraft	2,171 14
	<hr/>
	\$18,953 64

668

No. 1042.

Note of L. B. Howard returned with this proof of
claim was surrendered under order of Court to L. B.
Howard.

Exhibit "FF."

Being described as " Note California National Bank
to United States National Bank of New York,
at 60 days, \$17,500."

669

\$17,500.

NEW YORK, October 13th, 1891.

Sixty days after date we promise to pay to the
United States National Bank or order, at its office
in the City of New York, the sum of seventeen thou-
sand five hundred dollars, for value received, with in-
terest, at the rate of per cent. per annum, we
having deposited herewith, and pledged as collateral
security to the holder hereof, the following prop-
erty, viz.:

670	Note of Allen D. Norman, L.,	3,500 00	due Oct. 31, 1891
	William Collier, L.,	4,499.65 &	
		interest	due Nov. 28, 1891
	Silver Gate Mfg. Co.,	8,488.40,	due Dec. 17, 1891
	Geo. W. Marston, L.,	2,500 00	due Dec. 18, 1891
	Bear Valley Irrigation Co., L.,	5,672.45 &	
		interest	due Jan'y. 1, 1892
	C. C. Seaman, L.,	7,500 00	due " 11, 1892

with authority to the holder hereof to sell the whole of said property, or any part thereof, or any substitutes therefor, or any additions thereto, at any broker's board in the city of New York, or at public or private sale in said city or elsewhere, at the option of such holder, on the non-performance of any of the promises herein contained without notice of amount claimed to be due, without demand of payment, without advertisement and without notice of the time and place of sale, each and every of which is hereby expressly waived.

It is agreed that in case of depreciation in the market value of the property hereby pledged (which marked value is now \$32,160.50) or which may hereafter be pledged for this loan, a payment shall be made on account of this loan upon demand of the holder hereof, so that the said marked value shall always be at least per cent. more than the amount unpaid of this note, and that in case of failure to make such payment, this note shall, at the option of the holder hereof, become due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and that the holders may immediately reimburse themselves by sale of the said property or any part thereof. In case the net proceeds arising from any sale hereunder, shall be less than the amount due hereon we promise to pay to the holder, forthwith after said sale, the amount of such deficiency with legal interest.

It is further agreed that any excess in the value of said collaterals, or surplus from the sale thereof beyond the amount due hereon, shall be applicable upon any other note or claim held by the holder hereof, against us now due or to become due, or

that may be hereafter contracted; and that, if no other note or claim against us is so held, surplus after the payment of this note shall be returned to us or our assigns. 673

It is further agreed that upon any sale by virtue hereof, the holder hereof may purchase the whole or any part of such property discharged from any right of redemption, which is hereby expressly released to the holder hereof who shall retain a claim against the maker hereof for any deficiency arising upon such sale.

Due December 15th.

CALIFORNIA NATIONAL BANK OF SAN DIEGO.

Per J. W. COLLINS,

President. 674

Endorsed: November 9, 1893, paid in full and cancel. Pay to the order of the United States National Bank and further agree to the terms and conditions of the collateral obligation entered into by the maker of the within note and hereby waive notice, demand and advertisement and notice of any substitution or change of securities and for value received hereby guarantee the performance of the promise entered into by the maker of said note.

Exhibit "HH."

Being described as "Certificate of Deposit California National Bank, No. 6481, May 23, 1891, \$10,000." 675

10,000/00 Dollars.

No. 6481.

THE CALIFORNIA NATIONAL BANK

SAN DIEGO, Cal., May 23, 1891.

J. W. Collins has deposited in this Bank Ten thousand dollars, payable to the order of himself, on return of this certificate endorsed.

(Signed) G. N. O'BRIEN, Cashier.

Endorsed: J. W. Collins.

676

Exhibit "II."

Being described as "Certificate of Deposit California National Bank, No. 6479, May 23, 1891, \$7,500."

7,500/00 Dollars.

No. 6479.

THE CALIFORNIA NATIONAL BANK

SAN DIEGO, Cal., May 23, 1891.

J. W. Collins has deposited in this Bank Seventy-five hundred dollars, payable to the order of himself, on return of this certificate properly endorsed.

677

(Signed) G. N. O'BRIEN, Cashier.

Endorsed: J. W. Collins. Pay to the order of Olin Wellborn for collection and proof of claim in name of S. N. Wood, of Denver, Colo.

Exhibit "JJ."

Being described as "Certificate of Deposit California National Bank, No. 6480, May 23, 1891, \$7,500."

7,500/00 Dollars.

678

No. 6480.

THE CALIFORNIA NATIONAL BANK

SAN DIEGO, Cal., May 23, 1891.

J. W. Collins has deposited in this Bank Seventy-five hundred dollars, payable to the order of himself, on return of this certificate properly endorsed.

(Signed) G. N. O'BRIEN, Cashier.

Endorsed: J. W. Collins. Pay to the order of Olin Wellborn for collection and proof of claim in name of S. N. Wood, of Denver, Colo.

Exhibit "KK."

679

Being described as "Letter George N. O'Brien,
February 10, 1891, to National Bank of Com-
merce, Kansas City, Missouri."

SAN DIEGO, Cal., Feby. 10, 1891.

National Bank of Commerce,
Kansas City, Mo.,

Gentlemen:

We are in receipt of your January statement show-
ing a balance due us of \$1,908.09, and same agrees
with our books, excepting the \$25,000 item which
we charged December 15th, and you do not show us 680
a credit, and which we both understand.

Yours truly,

G. N. O'BRIEN,

Cashier.

681

682

Exhibit "LL."

Being described as Stipulation as to testimony of C.
J. White.

UNITED STATES CIRCUIT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Re-
ceiver of the California Na-
tional Bank, San Diego, Cali-
fornia,

Plaintiff,

AGAINST

AMERICAN SURETY COMPANY OF
NEW YORK,
Defendant.

Action No. 1.

683

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Re-
ceiver of the California Na-
tional Bank, San Diego, Cali-
fornia,

Plaintiff,

AGAINST

AMERICAN SURETY COMPANY OF
NEW YORK,
Defendant.

Action No. 2.

684

It is hereby stipulated for the purposes of the trials
of above entitled actions that so much of the depo-
sitions of C. J. White (witness examined on the part
of the plaintiff at Kansas City on the 15th day of
September, 1894) contains the questions put and the

answers given by the said C. J. White upon cross-examination shall be deemed to be stricken out, except the questions and answers which read as follows: 685

Q. Whose note was that \$25,000? A. The \$25,000 note was given by Collins and Dare.

Q. To whose order? A. I do not know. I did not look that up.

It is further stipulated that the defendant or its attorney will not object to the deposition of testimony of said C. J. White upon the ground of his not having sufficient personal knowledge of the facts testified to by him.

Dated New York City, October 4, 1894.

686

MITCHELL & MITCHELL,
Plaintiff's Attorney.
HENRY C. WILLCOX,
Defendant's Attorney.

Exhibit "MM."

Being described as Letter George N. O'Brien, April 11, 1891, to W. S. Woods, President National Bank of Commerce, Kansas City, Missouri.

APRIL 11th, 1891.

W. S. WOODS, Esq., Pres't.,

NATIONAL BANK OF COMMERCE, KANSAS CITY, MO.

687

Dear Sir:

Herewith please find note J. W. Collins, dated April 15th, \$20,000 payable on demand at National Bank of Commerce, Kansas City, accompanied by check of J. W. Collins, Pres't., payable to your order, same amount. You will remember making for our Mr. Dare some months since a credit to the California National Bank in special account and amount similar to this, against which we are not expected to make our drafts. Exchange being pretty close at this time it will be to our advantage

688 if you will kindly make similar arrangement for us. We were recently waited upon by the United States Bank Examiner who complimented our management quite highly and we are desirous of making a good showing for the next statement and can afford to allow you same rate of interest as was charged on previous loan of this nature in case a lower rate will not fill the bill if you will kindly accommodate us to that extent. Thanking you for past favors and hoping for a continuance of same.

Yours truly,

G. N. O'BRIEN,
Cashier.

689

Exhibit "NN."

Described as being Report made by the witness Bloodgood to plaintiff—marked simply "for identification."

Exhibit "OO."

Being described as letter from plaintiff to defendant.

AMERICAN SURETY COMPANY,

160 Broadway, New York, N. Y.

690

Dear Sir,—I write to notify you that the California National Bank held a bond to the amount of \$20,000.00 in its favor for the faithful performance of duties by J. W. Collins, its late President, also in favor for the faithful performance of duties by Geo. N. O'Brien, its Cashier, for \$15,000.00. I therefore notify you that a discovery of fraud has been made of sufficient amount to require the payment of those indemnity bonds to the undersigned receiver of the California National Bank.

I therefore ask that you forward us the necessary blanks to make the claim or claims in proper form.

Respectfully yours,

FREDERICK N. PAULY,
Receiver.

Exhibit "QQ."

691

Being described as Letter from defendant to plaintiff, May 31, 1892.

NEW YORK, May 31st, 1892.

Mr. FREDERICK N. PAULY, Receiver,
California National Bank,
San Diego, Cal.

Dear Sir:

We are this morning in receipt of your letter of the 23rd inst., stating that you have discovered fraud on the part of J. W. Collins, late president of the California National Bank, and on the part of Geo. N. O'Brien, late cashier of said bank, sufficient to require payment by this company under bonds heretofore issued upon the parties named in favor of the said California National Bank. 692

I transmit herewith two claim blanks with three continuation sheets with each, upon which please itemize any claim you may have to present under the bond of J. W. Collins; also upon the bonds of George N. O'Brien showing the precise dates of alleged embezzlements on the part of said John W. Collins and said George N. O'Brien; and the amounts thereof; after which please attest the same under oath and transmit to this office furnishing to our inspector, Mr. Bradbury Williams, who will call upon you, a duplicate statement of the items with the dates thereto attached, so that he may be able to verify the account. 693

Will you also please inform me where Geo. N. O'Brien is at present, and whether you have made a formal demand upon him for the amount alleged to be due, and whether he has refused to pay the same; also the date of said demand, and if made in writing will you please send us a copy of said demand and furnish a copy to our Inspector, Mr. Bradbury Williams.

694 We desire to have you perfect your claims with the utmost expedition, and when received they will be duly considered.

Yours truly,

H. D. LYMAN,

Vice-President.

Exhibit "RR."

Described as being "Statement of Account of J. W. Collins," was marked as "Exhibit RR for identification" and subsequently put in evidence as Plaintiff's Exhibit J 1.

695

Exhibit "SS."

Described as being Letter, plaintiff to defendant, June 24, 1892; received July 1, 1892.

SAN DIEGO, CALIF., June 24th, 1892.

HENRY D. LYMAN, V. P. American Surety Co.,
160 Broadway, New York City.

696

Dear Sir: In reply to yours of 31st ult., I hand you herewith two affidavits in regard to the embezzlement of the late J. W. Collins and Geo. N. O'Brien, furnished after consultation with my legal adviser, as giving information fuller than I otherwise could do by using the blank sent me in your favor of above date. Mr. G. N. O'Brien is still living in San Diego City. A formal demand was made upon him in writing for the amounts embezzled by his aid and assistance from the California National Bank, to which he has as yet made no reply. The affidavit herein relative to J. W. Collins includes an item of \$10,000 discovered after making the affidavit sent you before. Duplicate affidavits and copy of the demand made upon G. N. O'Brien will be furnished

your Mr. Bradbury Williams when he calls. Trust- 697
 ing you will find this statement explicit enough for
 your purpose and that we may in the near future
 receive payment as required under the bonds that
 should guarantee the California National Bank
 against loss on the part of the hereinbefore men-
 tioned J. W. Collins and Geo. N. O'Brien.

Truly yours,
 (Sgd) FREDERICK N. PAULY,
 Receiver.

Exhibit "TT."

698

Being described as Notice, plaintiff to defendant,
 June 24th, 1892.

June 24th, 1892.

THE AMERICAN SURETY CO.,
 New York.

Notice is hereby given that George N. O'Brien,
 late cashier of the California National Bank of San
 Diego, California, between the first day of July,
 1891, and the first day of January, 1892, as such
 cashier, and while so employed as such by the said
 California National Bank of San Diego, at San
 Diego, California, and while having in his charge
 the books, accounts, moneys, securities and personal
 property of said California National Bank of San
 Diego and while as such cashier having authority to
 sign the corporate name of said bank upon authority
 of its Board of Directors and in the usual and
 ordinary transaction of its business affairs, did,
 within dates last above set forth, fraudulently and
 for the purpose of defrauding said bank, as cashier,
 issue and deliver to J. W. Collins, the President of
 the bank, two certain certificates of deposit, dated
 September 22d, 1891, numbered 6800 and 6801 re-
 spectively; the first for seventy-five hundred dollars

699

700 (\$7,500), the second for eighty five hundred dollars (\$8,500), said certificates certifying in effect that said Collins had on deposit in said bank the sums in said certificates mentioned, when in truth and in fact the said Collins had no sum on deposit in said bank and said bank was not indebted to him in any sum, which fact the said G. N. O'Brien well knowing, delivered said certificates to said Collins and the same were by said Collins subsequently negotiated and the money obtained thereon appropriated by the said Collins to his own use.

That said certificates were issued by said O'Brien for the purpose of loaning the credit of the said bank to said Collins and for no other purpose. That said
701 certificates have been presented by holders thereof to the undersigned as Receiver, who has refused to accept the same, and suit thereon is now pending in the Circuit Court of the United States, Ninth Circuit.

That on the 13th and 14th days of October, 1891, said G. N. O'Brien, being the cashier of said bank and as such cashier having charge and supervision of the books of said bank, made entries on the deposit tags, and caused the same to be entered by a bookkeeper in the books of the bank of credits in favor of J. W. Collins of the sum of forty-five thousand dollars without the said Collins paying any consideration therefor to said bank, and without
702 being entitled to said credits, as he, the said O'Brien, then and there well knew.

That afterwards, on the 31st of October, 1891, the said G. N. O'Brien as such cashier, then being in charge of the books of said bank, and having authority as such cashier to make the entries herein-after stated, did, on said day, on the deposit tags of said bank enter two credits to J. W. Collins each of ten thousand dollars, and caused the same to be entered by a bookkeeper in the books of the bank without the said J. W. Collins paying any consideration therefor to said bank and without being entitled to said credits; and as such cashier suffered

and permitted the said Collins to check out of said bank and apply to his own use the whole sum of twenty thousand dollars, so wrongfully and erroneously credited to him as aforesaid by said O'Brien. 703

That in pursuance of a certain bond numbered \$5,565 heretofore issued by your company, in which you agree to make good and reimburse the said California National Bank of San Diego all and any pecuniary loss sustained during the continuance of the bond on account of the fraud or dishonesty of the said G. N. O'Brien, after a written statement of said loss is presented. This notice is given by the undersigned, Frederick N. Pauly, Receiver of the California National Bank of San Diego, appointed such receiver December 18, 1891, by the Comptroller of the Currency of the United States, and attached hereto is a statement of the loss, duly certified by the said Receiver, now representative of said employer named in said bond. 704

That said George N. O'Brien is insolvent; that demand in writing has been made upon him that he reimburse and repay to said bank the amounts hereinbefore dishonestly and fraudulently obtained of said bank, which he has refused to do.

This notice is given you as soon as practicable after the occurrence of the wrongful acts hereinbefore referred to and demand is hereby made upon you by the undersigned, as representative of said bank and as such receiver, for the sum of fifteen thousand dollars (\$15,000), the amount in said bond stipulated. 705

Respectfully yours,
(Sgd.) FREDERICK N. PAULY,
Receiver.

Exhibit "UU."

Described as being "Proof of Claim, June 24, 1891," previously put in evidence as Plaintiff's Exhibit A.

706

Exhibit "VV."

Described as being Letter of defendant to plaintiff,
July 8, 1892.

JULY 8, 1892.

MR. FREDERICK N. PAULY, Receiver,
California National Bank, San Diego, Cal.

Dear Sir:

707

We are in receipt of your two letters of the 24th ultimo, transmitting two affidavits relative to the claim under the bonds of this company to the California National Bank for J. W. Collins and George N. O'Brien in the respective positions of president and cashier of said bank. We have respectfully to request that you will make a statement of each on the claim forms which we use for that purpose, two of which are herewith enclosed. We desire full information in regard to the shortages and credits, of every kind whatever, whether on account of salary due, money paid or assignments made by either of said persons to the California National Bank. If there has been any action brought against Mr. George N. O'Brien, or any correspondence between the bank or you, with either of the persons in regard to the matter, we should be pleased to have copies thereof.

Yours truly,

(Sgd.) H. D. LYMAN,
Vice-President.

708

Exhibit "WW."

Being described as Letter, plaintiff to defendant,
July 18, 1892.

SAN DIEGO, CAL., July 18th, 1892.

HENRY D. LYMAN, Esq., V. P.,

American Surety Company, New York City.

Dear Sir:

In reply to yours of 5th inst. relative to my claim under the bonds of your Company to the California

National Bank for J. W. Collins and G. N. O'Brien, 709
 I beg to herewith send you a statement of account
 of J. W. Collins, showing the amount of his de-
 ficiency to be \$374,978.22. A list of the property
 assigned by J. W. Collins to the California National
 Bank with the estimation of the value thereof. J.
 W. Collins under the name of Dare & Collins is a
 defaulter to the bank in the sum of \$348,703.52 in
 addition to the amount above stated. An itemized
 statement of the account can also be forwarded you
 if desired.

With regard to G. N. O'Brien, no action has been
 brought against him, because he is execution proof.
 In reply to my demand for payment for the amounts
 embezzled by J. W. Collins during the term covered 710
 by these bonds, he replied as per copy of his letter
 herewith enclosed.

In compliance with the request of the U. S.
 Attorney I appeared before the Grand Jury and
 testified as to the state of facts that existed im-
 plicating G. N. O'Brien in the defalcations with J.
 W. Collins. What action the Grand Jury will take
 has not yet transpired.

Trusting that these statements will meet your
 requirements, I am

Very respectfully yours,

FREDERICK N. PAULY,

Receiver. 711

Exhibit "XX."

Described as being statement of all property con-
 veyed by J. W. Collins in his lifetime as
 security for the payment of his indebtedness to
 the California National Bank.

712

Real Estate.

Lots A, F, G, H and I in Block 244 of Horton's addition in the City of San Diego, value	84,500 00
29 lots in University Heights, value	580 00
An undivided interest in a lot of land in Pueblo, lot 1110, said to be equivalent in size to all lots, 25 feet by 40 feet each; probable value	50 00
118 lots in Park Villas, an addition to the City of San Diego, value	1,180 00

Personal Property.

713 A leasehold in Lot D, of Block 36 of Horton's addition in the City of San Diego, and some furniture in the building. This lease has expired and the amount realized therefrom was the sum of	28 50
4 Life Insurance policies were assigned by said Collins to the Bank. These have been collected, and the amount realized therefrom was the sum of ...	20,448 17
Five shares of the Silver Gate Building and Loan Association, value	750 00
2,821 shares of the College Hill Land Association, probable value	1,692 00

714

There was also assigned some stock of the California National Bank, some stock of the Hotel Brewster Company, some stock of the Rose Canon Brick Company, some stock of the Silver Gate Manufacturing Company, all of the foregoing are valueless.

There was an interest conveyed by deed in real estate in the State of Wyoming, from which nothing has been realized and which is considered to be valueless, being covered by prior liens to its full value.

There was some real estate conveyed by said Collins situated in the City of Sonoma, California; but

it was mortgaged for its full value, and the mortgage has been foreclosed. 715

There was also other property included in some of his conveyances, but which, upon investigation, was shown to be valueless on account of defect in title and encumbrances thereon; and some pieces of property in which he had no interest whatever, but held the same simply as trustee for the Bank.

(Signed) FREDERICK N. PAULY.

Exhibit "YY."

Being described as Letter, defendant to plaintiff, July 26, 1892. 716

NEW YORK, July 26th, 1892.

Mr. FREDERICK N. PAULY, Receiver,
California National Bank,
San Diego, Cal.

Dear Sir:

Yesterday afternoon we received your communication of the 18th instant and its enclosures, making formal claim against this Company under bonds of the late J. W. Collins and G. N. O'Brien, formerly the President and Cashier respectively of the California National Bank, and for information in regard to the whole case we have referred copies of documents to our Inspector, Mr. Bradbury Williams, for investigation and report. You do not transmit to us a copy of your letter of the 20th of June addressed to Mr. George N. O'Brien, to which he replied on June 24th last as per copy transmitted by you. 717

Inquiry into this matter cannot necessarily be completed for some time by reason of the peculiar situation of affairs, and also because of the enforced absence of Mr. Williams on other matters, which will delay him for some two weeks or more. Please give Mr. Williams all the information he desires, in

718 order that full advices may be transmitted to this Company at the earliest practicable date, so that we may pass intelligently on the claim in question.

Yours truly,

(Sgd) H. D. LYMAN,
Vice-President.

Exhibit "ZZ."

Being described as Letter, plaintiff to defendant,
August 1st, 1892.

719 SAN DIEGO, CAL., Aug. 1st, 1892.

H. D. LYMAN, Esq., V.-P.,
American Surety Co.,
160 Broadway, New York.

Dear Sir:

720 Yours of 26th ult., acknowledging receipt of mine of 18th inst. and enclosures, making formal claim against the American Surety Company under the bonds of J. W. Collins and Geo. N. O'Brien, the former President and Cashier respectively of the California National Bank, duly received. I was not aware that you required a copy of my letter addressed to Mr. G. N. O'Brien, Cashier, hence the omission to include it. Repairing omission, I herewith enclose copy of said letter. Your request to give your Mr. Williams all the information he desires in order that full advices may be transmitted to your Company, noted and will have my attention whenever Mr. Williams makes request for said information.

Respectfully yours,
(Sgd) FREDERICK N. PAULY,
Receiver.

Exhibit "A1."

Being described as Letter, defendant to plaintiff,
August 8, 1892.

NEW YORK, August 8, 1892.

Mr. FREDERICK N. PAULY, Receiver,
California National Bank,
San Diego, Cal.

Dear Sir:

We acknowledge receipt to day of your letter of the 1st instant, with copy of your letter of the 20th of June last addressed to George N. O'Brien, making demand upon him for moneys alleged to have been misappropriated and embezzled from the California National Bank by his aid and assistance.

722

Yours truly,
(Sgd.) H. D. LYMAN,
Vice-President.

Exhibit "B1."

Being described as Letter, plaintiff to defendant,
September 6, 1892.

SAN DIEGO, CAL., Sept. 6th, 1892.

Mr. H. D. LYMAN, Vice-Pres't,
American Surety Co.,
160 Broadway, N. Y.

723

Dear Sir:

It is now almost six weeks since I received yours of 26th of July acknowledging receipt of our claims under bonds of the late J. W. Collins \$25,000 and Geo. N. O'Brien \$15,000, respectively, since which time I have heard nothing from you. I would like to know how soon we may expect a payment of our claims as stated therein.

Truly yours,
(Sgd.) FREDERICK N. PAULY,
Receiver.

724

Exhibit "C1."

Being described as Letter, defendant to plaintiff,
September 14, 1892.

SEPTEMBER 14th, 1892.

Mr. FREDERICK N. PAULY,
California National Bank,
San Diego, Cal.

Dear Sir:

In reply to your letter of the 6th instant, and referring to my letter of the 26th of July, in the matter of J. W. Collins and George N. O'Brien, I have to state that our Inspector, Mr. Bradbury
725 Williams, who has charge of this case, was sent to Vancouver, B. C., on an important matter and was detained first for three days on account of small-pox quarantine at that point, and afterwards by sickness which has prevented him from getting back to San Diego as soon as we hoped. I expect that he will shortly be able to reach San Diego and take up the inquiries in this case to determine the merits of your claim.

All that we have from you is what purports to be a transcript for Mr. Collins' personal account in the Bank upon which, at the time the Bank stopped business, there appears a large balance due. On the face of the document, it appears that Mr. Collins
726 had a running account and credit beginning as far back as May 18, 1888, and that when the Bank accepted our bond, the account appeared overdrawn \$149,278.06, or on June 29th, 1891. I merely call your attention to this and inquire whether this be a fact.

Yours truly,

(Sgd.) H. D. LYMAN,
Vice-President.

Exhibit "D1."

727

Being described as Letter of plaintiff to defendant,
September 21, 1892.

SAN DIEGO, CAL., Sept. 21, 1892.

H. D. LYMAN, Esq., V. P.,
American Surety Company,
160 Broadway, New York City.

Dear Sir:

Yours of 14th inst. replying to mine of 6th inst.
in the matter of J. W. Collins and George N.
O'Brien received and contents fully noted.

The running account that I sent you as showing
Mr. Collins standing with the California National
Bank represents that account after corrections of
erroneous and fraudulent entries and does not show
what the books showed on June 29th, 1891. On
that date by the books J. W. Collins appeared to
have \$68,175.67 to his credit. 728

There has been so much delay in this matter that
I have placed it, under the directions of the Com-
ptroller, in the hands of the U. S. Attorney in New
York, Edward Mitchell, Esq., with instructions to
collect the same.

Respectfully yours,
(Sgd.) FREDERICK N. PAULY,
Receiver.

Exhibit "E1."

729

Being described as Letter, defendant to plaintiff,
September 28, 1892.

NEW YORK, September 28, 1892.

Mr. FREDERICK N. PAULY, Receiver,
California National Bank,
San Diego, Cal.

Dear Sir:

We are in receipt to-day of your letter of the 21st
instant in the matter of J. W. Collins and George
N. O'Brien, and observe by the last paragraph of
your letter that by direction of the Comptroller you
have placed the matter in the hands of the United

- 730 States Attorney in New York, Edward Mitchell, Esq.,
with instructions to collect the same. Will you
please inform me whether you have forwarded to
Mr. Mitchell all the books and evidence in the case?
We trust not, because we have instructed our In-
specter, Mr. Bradbury Williams, to go to San Diego
and investigate the whole subject and make report
so that we may intelligently be advised on all the
points. It is some distance to San Diego and there
is considerable expense attending an inquiry of the
kind, and it can be better carried on at San Diego
than anywhere else. We are well pleased that when
taking up the matter finally, we can deal here with
the United States Attorney on the merits of the case,
731 and it will be most convenient for the Attorney and
this Company.

Yours truly,
H. D. LYMAN,
Vice-President.

Exhibit "F1."

Being described as Letter, plaintiff to defendant,
October 4, 1892.

SAN DIEGO, CAL., Oct. 4, 1892.

HENRY D. LYMAN, Esq., V.-P.,
American Surety Co.,
New York City.

732 Dear Sir:

Replying to yours of 28th instant in the matter of
J. W. Collins and Geo. N. O'Brien, answering your
question as to whether all of the books and evidence
in the case have been forwarded to the U. S. Attor-
ney in New York, I beg to state they have not.
Such evidence, however, will be forwarded to the
U. S. Attorney as he may need for his purpose. We
shall, however, retain in the office here information
to satisfy Mr. Bradbury Williams upon any point
that he may desire information.

Truly yours,
FREDERICK N. PAULY,
Receiver.

Exhibit "J1."

733

Designated as statement of account sent by
 plaintiff to defendant with letter of July 18,
 1891.

1888.		1888.	
Jan.	19..... 10 00	Jan.	9..... 5,000 00
	23..... 5,000 00		12..... 2,000 00
	23..... 500 00		23..... 4,387 00
	25..... 5 00		28..... 3,960 00
	24..... 72 50	Feb.	27..... 500 00
	27..... 10 00		28..... 2,000 00
	28..... 1,000 00	Mar.	2..... 3,917 33
	30..... 50 00		5..... 3,333 75
	30..... 2,875 00		10..... 5 00
	30..... 50 00		26..... 100 00
	30..... 25 00		27..... 4,000 00
Feb.	4..... 6 00	Apr.	2..... 450 00
	6..... 686 45		6..... 15 75
	6..... 890 35		10..... 2,561 50
	6..... 400 00		17..... 21 38
	7..... 1 00		25..... 100 00
	28..... 3,000 00	Mar.	1..... 2,164 75
	29..... 4,000 00		7..... 3,575 00
Mar.	2..... 200 00		12..... 19 00
	2..... 1 95		14..... 27 70
	2..... 511 12		15..... 4,500 00
	5..... 10 00		18..... 1,500 00
	6..... 218 55		19..... 132 00
	6..... 144 00		21..... 1,500 00
	6..... 3,500 00		25..... 750 00
	7..... 10 00	June	2..... 16 25
	9..... 2 00		1..... 150 00
	10..... 67 50		6..... 3,775 00
Mar.	10..... 30 00	June	28..... 1,700 00
	10..... 75 00	July	2..... 150 00
	15..... 25 00		5..... 31 75
	15..... 5 00		27..... 1 00
	15..... 25 00		31..... 150 00

734

735

736 1888.

15.....	200 00
28.....	3,000 00
31.....	750 00
31.....	45 00
Apr. 2.....	25 00
3.....	10 00
5.....	30 00
10.....	30 00
11.....	55 00
13.....	25 00
17.....	4,231 00
18.....	1 60
20.....	10 00

737

May

10.....	1,030 00
1.....	75 00
4.....	552 55
7.....	5 00
9.....	2 50
15.....	111 63
10.....	25 00
9.....	2 25
12.....	122 50
12.....	14 00
May 12.....	20 00

1888.

Aug. 7.....	500 00
9.....	3,928 00
14.....	25
14.....	300 00
14.....	83 33
18.....	31 00
20.....	40 00
23.....	100 00
27.....	20
31.....	150 00

Sept. 29..... 855 25

Oct. 3..... 150 00

6..... 166 66

6..... 1,107 13

Oct. 17..... 40 00

23..... 156 32

Nov. 12..... 300 00

13..... 4,000 00

19..... 83 33

21..... 3,000 00

Dec. 3..... 25 00

4..... 337 19

8..... 1,100 00

Dec. 29..... 25 00

1889.

Jan. 7..... 25 00

8..... 100 00

10..... 534 00

16..... 699 75

Feb. 2..... 134 15

5..... 565 81

Total..... 71,629 53

Page 1 of Exhibits ends here.

Total..... 45,036 68

May 18..... 131 50

5..... 93 00

19..... 12 50

21..... 13 75

Feb. 6..... 900 00

6..... 50 00

15..... 994 90

23..... 43 32

			1889.	739
	22.....	25 00	Mar. 11.....	400 00
	18.....	66 70	14.....	5 00
	21.....	750 00	Apr. 1.....	1,000 00
	23.....	50 00	May 4.....	200 00
	28.....	32 45	22.....	1,107 39
June	1.....	173 75	June 3.....	499 98
May	31.....	500 00	20.....	43 23
June	1.....	9 56	July 3.....	164 50
	4.....	30 00	6.....	1,150 00
	2.....	3 00	16.....	50 00
	7.....	13 00	20.....	2 50
	12.....	25 00	Aug. 12.	1,500 00
	12.....	4,000 00	2.....	1,900 00
	12.....	35 00	20.....	3,279 52
	12.....	65 00	30.....	296 88
June	13.....	200 00	Aug. 31.....	100 00
	14.....	200 00	Sept. 21.....	1,000 00
	11.....	10 00	24.....	1,789 25
	12.....	65 00	Oct. 2.....	50 00
	23.....	1 30	14	7,500 00
	12.....	50 00	25.....	4,000 00
July	3.....	150 00	Nov. 1.....	50 00
	3.....	45 00	2.....	5,000 00
	19.....	67 50	Nov. 6.....	39 00
	10.....	490 84	Dec. 2.....	50 00
	17.....	84 17	11.....	57 60
	17.....	166 66	24.....	5,000 00
	20.....	250 00	27.....	2,080 00
	20.....	46 66	31.. ..	500 00
			1890.	741
	21.....	330 00	Jan. 3.....	359 66
	21.....	57 00	4.....	1,140 00
	25.....	20 00	13.....	666 66
	26.....	5 00	13.....	92 50
	31.....	10 00	17.....	150 00
	31.....	6 25	18.....	50 00
Aug.	1.....	6 75	21.....	6,000 00
	1.....	40 00	Feb. 1.....	50 00
	1.....	75 00	6.....	1,000 00

742

2.....	10 00
6.....	112 50
8.....	500 00
22.....	4,500 00
23.....	14 60
23.....	5 00
24.....	10 00
27.....	10 00
24.....	10 00
Sept. 3.....	10 00
4.....	19 78
3.....	5 00
4.....	100 50
5.....	82 25
6.....	218 55
15.....	10 00
12.....	10 00
14.....	46 66
10.....	200 00
10.....	30 00
15.....	25 00

743

Page 2 of Exhibits ends here.

Total... 14,371 93

744

Sept. 20.....	15 00
20.....	61 14
8.....	10 00
27.....	17 00
28.....	1,555 00
29.....	10 00
Oct. 1.....	6 25
Sept. 25.....	3 80
29.....	517 13
Oct. 2.....	15 22
4.....	5 00
Oct. 5.....	5 00
2.....	7 05
6.....	573 00
6.....	44 85
8.....	50 00
8.....	10 00

1890.

14.....	5,500 00
19.....	7,000 00
20.....	136 08
28.....	5,000 00
Mar. 8.....	50 00
22.....	1,000 00
24.....	10 00
26.....	5,000 00
31.....	490 00
Apr. 4.....	7,500 00
16.....	50 00
19.....	28 55
24.....	5,000 00
May 2.....	50 00
2.....	193 00
6.....	48 25
10.....	512 50
13.....	750 00
31.....	1,250 00
May 21.....	500 00
June 3.....	50 00
June 7.....	4,495 00
9.....	625 00
11.....	337 97
11.....	14 25
18.....	4,000 00
20.....	1,875 00
28.....	215 75
30.....	1,977 00
July 3.....	281 50
8.....	41 67
9.....	1,595 00
July 14.....	125 00
15.....	2,000 00
16.....	7,000 00
17.....	1,867 71
Aug. 1.....	50 00
25.....	963 10

96,482 67

			1890.	745
	8.....	100 00	Sept. 2.....	50 00
	10.....	50 00	12.....	34 78
	9.....	13 00	12.....	50 00
	13.....	500 00	13.....	8 50
	12.....	20 00	24.....	27,500 00
	13.....	5 00	24.....	25,000 00
	13.....	50 00	Oct. 2.....	50 00
	15.....	150 00	4.....	1,348 33
	15.....	100 00	6.....	100 00
	8.....	30 00	9.....	250 00
	10.....	305 00	20.....	75 00
	27.....	10 00	22.....	1,140 20
	31.....	30 00	25.....	35 00
	31.....	111 50	28.....	15,000 00
Nov.	1.....	25 00	.....	12 50
	4.....	1 05	.....	465 00
	16.....	3 00	30.....	62 50
	19.....	50 00	Nov. 5.....	242 50
	16.....	100 00	5.....	15,000 00
	24.....	10 00	5.....	500 00
	27.....	80 88	26.....	10,000 00
Dec.	1.....	300 00	Dec. 1.....	501 50
	1.....	458 00	1.....	50 00
	1.....	81 38	10.....	330 05
	3.....	1 50	11.....	10 40
	3.....	50 00	13.....	10,000 00
	3.....	624 88	15.....	350 00
	1.....	1,088 10	22.....	12,000 00
	1.....	337 19	26.....	54 80
	3.....	150 00	30.....	1,000 00
	4.....	10 00		
	4.....	250 00	1893.	
	5.....	5 00	Jan. 2.....	50 00
	6.....	9 50	.....	150 00
	6.....	24 00		
	7.....	10 00	12.....	312 50
	7.....	106 00	.....	1,345 00
	10.....	2 60	16.....	125 00
	11.....	30 30		

746

747

748

13..... 10 00
 13..... 50 00
 15..... 200 00
 15..... 20 90
 18..... 10 00
 19..... 50 00
 7..... 229 90

1893.

19.....11,087 51
 22..... 300 00
 30..... 3,483 18
 4..... 50 00
 Feb. 7..... 698 50
 7..... 125 00
 10..... 1,000 00
 14..... 58 75
 20..... 250 00
 Mar. 6..... 1,000 00

Page 3 of Exhibits ends here.

Total.....8,759 12

Total....170,595 48

749 1888.

Dec. 31..... 50 00
 21..... 75 00
 24..... 500 00
 27..... 25 00
 29..... 47 50
 24..... 100 00
 31..... 250 00

Mar. 7..... 250 00
 7..... 1,531 98

12..... 20,456 21
 18..... 10,000 00
 19..... 762 32

1890.

Jan. 1..... 3 50
 4..... 4 00
 4..... 9 40
 12/31..... 290 00
 750 1/ 7..... 1,030 00
 8..... 200 00
 11..... 1,000 00
 15..... 93 33
 18..... 5 00
 22..... 1 00
 23..... 15 00
 22..... 10 00
 25..... 20 00
 27..... 14 50
 28..... 5 00
 30..... 40 00
 30..... 3 00

30..... 1,230 00
 Apr. 9..... 12,500 00
 11..... 500 00
 13..... 3,750 00
 16..... 4,500 00
 May 7..... 383 00
 8..... 16,000 00
 13..... 1,250 00

June 1..... 5,880 00
 20..... 550 00
 July 15..... 125 00
 23..... 39,145 34
 31..... 264 00
 31..... 20,000 00
 31..... 10,000 00

1890.				751
Feb.	2.....	13 00	Aug. 3.....	839 13
	5.....	15 00		
	2.....	6 25	4.....	1,385 00
	4.....	67 50	10.....	2,000 00
	4.....	694 90	12.....	777 08
	4.....	50 00	12.....	412 50
	4.....	362 50	18.....	25 00
	7.....	10 00		500 00
	7.....	4 90		2,500 00
	7.....	32 00	26.....	20 50
	9.....	10 00	Sept. 1.. ..	625 00
	12.....	2 00	10.....	200 00
	21.....	25 15		
	21.....	20 00	12.....	3,000 00
	28.....	5 00	Oct. 1.....	54 00
	28.....	50 00	7.....	8,000 00
Mar.	4.....	20 00	12.....	5,000 00
	6.....	14 00	17.....	138 79
	9.....	200 00	24.....	2,082 50
	10.....	10 00	Nov. 3.....	8 53
	14.....	906 68	6.....	8,250 00
	16.....	20 00	10.....	10 00
	18.....	10 00	11.....	500 00
	18.....	5 00		18,640 88
	7.....	668 55		
	19.....	20 00		
	20.....	200 00		
	21.....	146 50		
	23.....	2 00		
	25.....	16 00		
	27.....	5 00		
Apr.	1.....	45 00		
Apr.	2.....	23 00		
	3.....	5 00		
	4.....	6 60		
	6.....	25 00		
	6.....	1 00		
	9.....	5 60		
	9.....	3 86		

Page 4 of Exhibits ends here.

Total..... 7,818 22

754 1890.

Apr. 9..... 5 00

12..... 19 15

12..... 22 50

12..... 100 00

20..... 20 00

May 1..... 19 75

5..... 2,300 00

2..... 1 25

2..... 2,200 00

3..... 5 00

4..... 3 00

3..... 50 00

3..... 50 00

755 3..... 50 00

225 00

3..... 362 50

6..... 2,387 60

7..... 81 37

8..... 120 00

8..... 13 00

9..... 60

9..... 25 15

9..... 20 00

13..... 100 00

15..... 5 00

18..... 942 50

20..... 758 94

756 21..... 15 00

1,000 00

11..... 1 00

27..... 5 00

31..... 10 00

31..... 20 00

June 2..... 5 00

4..... 6 65

3..... 50 00

5..... 80 00

5..... 5 00

4..... 65

13..... 116 65

1890.

	20.....	20 00
		6 00
	21.....	7 00
	22.....	300 00
	25.....	2 00
	27.....	40 80
	30.....	6 00
	30.....	5 00
July	1.....	27 00
	2.....	78 60
	5.....	65 00
	6.....	11 80
	6.....	2,998 80
	6.....	6 00
	10.....	4 00
	16.....	5 00
	20.....	7 21
	23.....	145 00
	24.....	15 00
		90 00
	27.....	100 00
		1 50
	29.....	3 00

758

Page 5 of Exhibits ends here.

Total..... 12,904 62

July	31.....	531 00
Aug.	2.....	25 15
	14.....	15 00
	15.....	884 57
	15.....	1,900 00
	15.....	362 50
	15.....	210 00
	27.....	315 00
Aug.	20.....	5,000 00
	19.....	416 66
	20.....	6 00
	26.....	487 00
	15.....	
	26.....	200 00

759

760 1890.

29----- 1 00
65

Sept. 2----- 40 25

5----- 13 50

Aug. 23----- 50 00

Sept. 6----- 218 55

7----- 20 00

9----- 2 00

21----- 4 50

24----- 157 50

25----- 10 00

26----- 41 60

27----- 1 00

761 30----- 5 00

20 00

26----- 6 00

Oct. 10----- 5 00

10----- 600 00

14----- 123 00

14----- 150 00

19----- 5 00

19----- 20 00

7----- 7 50

21----- 50 00

7----- 1 25

Oct. 25----- 48 55

25----- 61 20

762 25----- 1,500 00

25----- 2,250 00

29----- 2 00

29----- 2 00

30----- 5 00

30----- 700 00

Nov. 1----- 22 50

2----- 45 50

2----- 77 50

Oct. 30----- 2 50

Nov. 2----- 5 00

4----- 984 00

5----- 50 00

1890.

5.....	5 00
13.....	4,000 00
Dec. 31.....	362 50
Nov. 17.....	180 50
9.....	17 85
8.....	20 00
9.....	55 04
14.....	100 00
14.....	1,440 00

Page 6 of Exhibits ends here.

Total, 25,610 02

15.....	199 10
15.....	65 65
Nov. 22.....	10 00
30.....	35 00
30.....	1,200 00
Dec. 2.....	5 50
Nov. 30.....	5 00
Dec. 3.....	226 90
3.....	48 00
4.....	20 00
4.....	85
4.....	120 00
4.....	55
6.....	1,000 00
10.....	136 08
10.....	50 00
11.....	3 00
11.....	370 00
15.....	5,000 00
13.....	84 00
17.....	10 00
18.....	1,050 00
16.....	3 75
19.....	5 00
20.....	10 00
23.....	12 00
21.....	218 55
24.....	10 00

764

765

766	1890.	
	26.....	2,080 00
	27.....	1,800 00
	Dec. 17.....	17 10
	30.....	5 00
	31.....	30 00
	31.....	290 00
	-----	55 00

	1890.	
	Jan. 2.....	35 00
	12/31/89	15 00
	12/31/89	5 00
	Jan. 2.....	18 35
	2.....	26 00
767	6.....	4 00
	2.....	22 60
	7.....	5 00
	7.....	43 75
	9.....	308 00
	10.....	410 00
	9.....	3 50
	13.....	102 00
	15.....	40 00
	14.....	10 00
	16.....	15 00
	17.....	25 00
	17.....	50 00
	21.....	1,068 00
768	21.....	1,900 00
	21.....	300 00
	21.....	150 00
	28.....	50 00
	25.....	82 92
	27.....	35 32
	Feb. 7.....	500 00
	7.....	20 00
	5.....	1 00

Page 7 of Exhibits ends here.

Total.... \$18 876 47

1890.

769

15.....	3 25
17.....	50 00
15.....	303 00
18.....	150 00
18.....	150 00
20.....	150 00
20.....	2,597 00
21.....	4,500 00
28.....	60 00
Mar. 1.....	100 00
3.....	20 00
2/28.....	6 00
26.....	1 00
3/4.....	20 50
	15 00
3.....	10 00
5.....	2 00
6.....	218 55
3.....	40 30
6.....	10 00
7.....	1 00
Mar. 11.....	10,000 00
13.....	15 00
12.....	25 00
18.....	5 00
18.....	20 00
14.....	100 00
14.....	750 00
18.....	1,000 00
24.....	21 00
24.....	3,500 00
26.....	21 70
27.....	1 00
28.....	11 50
27.....	60 00
29.....	1,500 00
Apr. 1.....	20 50
1.....	8 75
3.....	10 00
3.....	37 57

770

771

772 1890.

4.....	75 00
3.....	50 00
3.....	700 00
1.....	100 00
4.....	10 35
5.....	10 00
8.....	3,000 00
8.....	164 00
11.....	15 00
7.....	500 00
11.....	4 15
14.....	5 00
16.....	100 00
16.....	3 50
20.....	5 00
22.....	4,500 00
21.....	50 00
24.....	980 00
24.....	50 00
26.....	15 00
22.....	1,375 00
26.....	50 00
30.....	1 00

773

Page 8 of Exhibits ends here.

Total.....37,277 62

774

1.....	50 00
5.....	50 00
5.....	95
7.....	241 25
8.....	75 00
10.....	1 30
10.....	50 00
13.....	50 00
2.....	20 30
13.....	3 50
13.....	416 67
15.....	2 75
15.....	23 42

1890.		
Apr.	15.....	25 00
	17.....	25 00
	17.....	10 00
May	1.....	100 00
	20.....	1,610 00
	20.....	5 00
	22.....	20 00
	22.....	1,500 00
	23.....	120 00
	27.....	1,146 83
	30.....	250 00
	29.....	1 00
		75 00
		11 00
		20 60
	30.....	20 00
	31.....	50 00
June	3.....	125 00
	3.....	1,000 00
	3.....	100 00
	3.....	4 00
	4.....	15 00
	3.....	2 50
	4.....	1,500 00
	4.....	500 00
	7.....	628 99
	5.....	10 00
	9.....	5,000 00
	9.....	5 00
	7.....	10 00
	9.....	320 83
	9.....	14 25
	11.....	375 00
	13.....	165 00
	13.....	5 00
	13.....	20 00
	17.....	3 50
	17.....	5 00
	17.....	16 00
	17.....	8 00

775

776

777

778 1890.

18.....	10 00
18.....	3 00
19.....	25 00
20.....	25 00
19.....	20 00
20.....	2,040 00
21.....	10 00
21.....	147 50
23.....	10 00
24.....	13 25
25.....	71 47

Page 9 of Exhibits ends here.

Total..... 18,162 72

779

26.....	10 00
26.....	10 00
27.....	60 00
30.....	20 00
30.....	12 35
July 1.....	26 50
1.....	21 72
1.....	20 00
1.....	3 00
1.....	892 80
1.....	5 00
1.....	2 00
1.....	100 00

780

2.....	2 50
2.....	500 00
1.....	18 10
2.....	16 55
4.....	3 50
3.....	474 44
3.....	38 46
3.....	2 50
5.....	85 00
5.....	15 00
3.....	86 50
11.....	2 00
1.....	1 30

1890.

781

9.....	3 55
2.....	40 00
10.....	431 15
11.....	125 00
12.....	3 46
7.....	2 00
14.....	1 00
10.....	10 00
16.....	1 35
16.....	1,500 00
16.....	500 00
30.....	250 00
12.....	175 20
12.....	2 50
24.....	2,000 00
31.....	244 00

Aug. 1.....	8 00
1.....	2 50
1.....	39 70
2.....	3 00
2.....	9 35
2.....	2 50
2.....	18 00
24.....	2,000 00
31.....	244 00

Aug. 1.....	8 00
1.....	2 50
1.....	39 70
2.....	3 00
2.....	9 35
2.....	2 50
2.....	18 00
2.....	3 00
2.....	15 00
2.....	2 50

Aug. 4.....	85
2.....	160 00
5.....	28 94
4.....	17 40
5.....	30 00

782

783

784 1890.

17.....	10 00
7.....	500 00
9.....	5 00
9.....	453 05
9.....	50 00
9.....	20 00

Page 10 of Exhibits ends here.

Total.....\$9,023 01

	13.....	60 25
	13.....	35 50
	13.....	1,375 00
	14.....	2 25
785	18.....	2,077 85
	8.....	32 75
	20.....	10 00
	15.....	8 60
	21.....	7 00
	23.....	25 00
	25.....	280 00
	29.....	25 00
	30.....	1 00
	29.....	8 00
	28.....	5 00
	30.....	250 00

Sept. 6.....218 55

5.....12 60

786 5.....6 92

10.....143 40

10.....5 75

10.....20 00

10.....100 00

161 65

11.....1 75

5.....8 54

4 50

14 00

187 00

15 00

13 00

1890.

787

	15	85
	97	95
	190	50
	25	00
	33	00
	14	00
	13	30
	600	00
	14,370	69
18.....	27,500	00
22.....	556	11
24.....	10	00
27.....	5	00
20.....	55	00
Sept. 25.....	10,000	00
26.....	6,500	00
	5	00
25.....	175	00
29.....	90	
Oct. 1.....	5	00
1.....	3	50
1.....	20	85
1.....	175	00
3.....	10	50
3.....	85	
3.....	1	70
6.....	5,000	00
8.....	1	00
8.....	298	00
11.....	18	00
14.....	75	
14.....	348	54

788

Page 11 of Exhibits ends here.

Total.....\$71,351 76

789

	14	10
15.....	5	00
14.....	20,000	00
5.....	1	50
13.....	80	00

790 1890.

23.....	6 50
23.....	180 00
23.....	200 00
24.....	10 00
24.....	1,075 58
25.....	5 00
25.....	35 90
25.....	25 00
25.....	857 50
25.....	76 82
	120 50
25.....	8 00
24.....	7 15

791 Nov.	1.....	10,000 00
	1.....	2 10
	1.....	59 05
	1.....	65 00
	3.....	13 00
	3.....	85
	1.....	3 00
	1.....	188 00
	5.....	225 00
	5.....	21 00
	5.....	5 00
	5.....	15,000 00
	6.....	480 39
	7.....	4 70

792	7.....	100 00
	7.....	4 42
	8.....	3 00
	8.....	8 00
	8.....	5 00

Nov.	10.....	206 66
	10.....	10 00
	10.....	24 75
	10.....	1,687 00
	10.....	20 00
	7.....	40 00
	12.....	4 75
	8.....	63 56

1890.

793

12.....	25 00
17.....	33 25
14.....	40 00
19.....	15 75
19.....	2 90
20.....	325 00
20.....	793 05
20.....	1,000 00
22.....	200 00
22.....	250 00
27.....	79 62
24.....	8 75
26.....	24 00
27.....	5 00
29.....	25 00
30.....	5 00
	3 00
	8 00

794

Page 12 of Exhibits ends here.

Total.....\$62,107 20

Dec. 2.....	6 00
1.....	14 75
3.....	25 00
4.....	55 00
2.....	10 20
6.....	4,000 00
5.....	15 00
5.....	10 00
6.....	10 00
4.....	3 00
6.....	25 00
8.....	224 20
6.....	6 45
6.....	86 50
10.....	50 00
10.....	13 35
11.....	1 00
8.....	150 70
12.....	1 00

795

796 1890.

11..... 50 00

13..... 10,000 00

24..... 5 00

17..... 5 00

18..... 1 00

9..... 1 00

18..... 400 00

18..... 10 00

22..... 30 00

Dec. 22..... 3,500 00

22..... 12,000 00

22..... 8,813 50

23..... 20 75

797 23..... 20 00

10..... 10 00

25..... 5 00

26..... 25 92

24..... 278 36

26..... 28 88

27..... 25 00

29..... 1,000 00

8..... 15,000 00

31..... 62 64

31..... 4 40

31..... 290 00

1891.

Jan. 2..... 60

798 2..... 235 25

2..... 2 85

3..... 5 00

3..... 5 00

3..... 41 73

6..... 17 25

6..... 65 00

6..... 4 00

6..... 1,001 00

6..... 1 00

7..... 200 00

Jan. 9..... 10 00

12..... 5 00

1891.

799

13..... 120 00

20..... 21 00

21..... 15 00

Page 13 of Exhibits ends here.

Total.....58,128 52

29..... 60 00

29..... 25 00

2 00

29..... 366 66

Feb. 2..... 100 00

2..... 150 00

2..... 10 75

1..... 14 10

6..... 300 00

11..... 314 00

11..... 70 00

12..... 106 40

14..... 10 00

14..... 20 00

16..... 3 50

12..... 1,000 00

17..... 13 45

17..... 5,800 00

12..... 100 00

20..... 1,000 00

27..... 30 00

25..... 120 00

Mar. 1..... 5 20

Mar. 2..... 1,000 00

28..... 100 00

4..... 40 00

5..... 25 00

6..... 1,000 00

6..... 218 55

9..... 9 00

9..... 27 00

5..... 500 00

12..... 16 00

12..... 129 55

12..... 50 00

800

801

802 1891.

13.....	5 00
13.....	5 00
14.....	100 00
14.....	750 00
14.....	68 90
14.....	150 00
16.....	100 00
18.....	7 50
18.....	10,000 00
19.....	762 32
23.....	1 50
23.....	375 00
25.....	5 00

803

26.....	2,500 00
27.....	5,555 60
27.....	1,214 89
27.....	4,760 65
27.....	12,000 00
27.....	500 00
27.....	6,000 00
27.....	4,170 00
27.....	190 00

Apr. 1..... 14 70

1..... 1 25

2..... 307 78

3..... 10 00

2..... 31 25

804 1..... 100 00

6..... 60 00

Page 14 of Exhibits ends here.

Total.....87,032 45

7..... 40 00

7.....10,776 48

7..... 513 70

7..... 47 00

8..... 1,000 00

5..... 5 00

8..... 60 50

2..... 18 50

1891.

805

2..... 120 00
 10..... 40 00
 14..... 15 55
 16..... 76 38
 17..... 1,500 00
 18..... 85 00
 22..... 219 87

Apr. 24..... 120 00
 18..... 7 70
 22..... 500 00
 27..... 2,000 00
 26..... 5 00
 27..... 414 00
 30..... 100 00

806

May 1..... 5 50
 2..... 440 00
 7..... 6 70
 7..... 1,606 66
 52 00
 8..... 5 00
 12..... 5 00
 8..... 7 40
 13..... 1,005 15
 4 00
 14..... 8,500 00
 15..... 5 00
 16..... 84 59
 18..... 1,000 00
 18..... 566 50

807

Apr. 13..... 1,260 00
 M. 19..... 200 00
 22..... 12 00
 23..... 60 00
 23..... 583 33
 23..... 350 00
 23..... 60 00
 23..... 72 50
 26..... 1,610 00
 23..... 50 00

808 1891.

June 4.....	306 67
1.....	173 08
1.....	400 00
16.....	25 40
12.....	150 00
25.....	25 00
27.....	200 00
27.....	60 00
27.....	50,000 00
27.....	1,000 00
28.....	2,000 00
29.....	1,000 00
30.....	4 00
29.....	50 00
1.....	25 00
2.....	18 00
2.....	100 00

809

Page 15 of Exhibits ends here.

Total . . . 90,809 16 ,

July 3.....	102 41	:
3.....	2,651 67	
3.....	122 50	
7.....	20,000 00	
7.....	5 00	
7.....	75 89	
7.....	151 11	

810

July 9.....	4 85
9.....	10 00
11.....	7,500 00
10.....	60 00
11.....	100 00
14.....	140 00
14.....	40 00
23.....	50,000 00
23.....	80 00
24.....	318 00
24.....	50 00
25.....	10,840 81
24.....	60 00

1891.

811

27.....	842 72
27.....	50 00
27.....	2 00
29.....	50 00
27.....	195 20
Aug. 1.....	1,500 00
5.....	5,880 00
9.....	1 00
5.....	98 05
3.....	21 25
10.....	67 17
7.....	100 00
11.....	412 50
11.....	6 00
11.....	50 00
11.....	760 50
11.....	10,000 00
11.....	236 65
12.....	90 00
	5 00
15.....	1,250 00
18.....	489 17
17.....	125 00
17.....	5 00
18.....	5 00
22.....	2,016 57
22.....	35 00
22.....	350 00
23.....	16 00
31.....	513 33
	16,500 00
	6,080 00
	118 50
Sept. 1.....	56 25
1.....	5 00
2.....	4,000 00
2.....	50 00
2.....	1,547 34
5.....	136 00
5.....	30 00

812

813

814 1891.

7..... 218 55

7..... 416 67

Page 16 of Exhibits ends here.

Total....160,593 65

Sept. 10.....15,000 00

12..... 750 00

14..... 1,134 37

17..... 12 00

17..... 83 10

17.....15,000 00

18..... 950 00

21..... 5,000 00

815 22..... 200 00

23..... 1,056 38

25..... 308 71

28..... 66 66

28..... 91 05

Oct. 1..... 5,000 00

5..... 1,500 00

6..... 90 00

6..... 205 84

6..... 71 66

1,016 66

9..... 41 32

12..... 5,000 00

13..... 363 60

816 6..... 201 66

14..... 500 00

16..... 5,000 00

17..... 300 00

17..... 3 75

20..... 455 00

20..... 268 48

20..... 311 00

22..... 116 67

23..... 33 75

23.....20,000 00

23..... 5,000 00

23..... 250 00

1891.

817

26..... 123 95
 26..... 5,000 00
 27..... 10,000 00
 30..... 11,000 00
 31..... 268 88
 90 00

Nov. 3..... 415 00
 7..... 4,400 00
 9..... 8,500 00
 7..... 475 00
 7..... 10,000 00
 10..... 1,521 50
 10..... 270 65
 9..... 11,250 00
 10..... 511 95
 10..... 20,000 00
 10..... 2,010 00

818

Page 17 of Exhibits ends here.

Total... 171,231 59

Page 1..... 45,036 68
 2..... 14,371 93
 3..... 8,759 12
 4..... 7,818 22
 5..... 12,904 62
 6..... 25,610 02
 7..... 19,876 47
 8..... 37,277 62
 9..... 18,162 76
 10..... 9,023 01
 11..... 71,351 76
 12..... 62,107 20
 13..... 58,128 52
 14..... 87,032 45
 15..... 91,809 16
 16..... 160,593 65
 17..... 171,231 59

71,629 53
 96,482 67
 17,095 48
 186,408 88

819

Balance... 374,978 22

 \$900,094 78

 \$900,094 78

1891.

Nov. 10. To Balance,

374,978 22

820 Copy of the account of J. W. Collins as contained in Ledgers 4 and 5 of the California National Bank of San Diego.

	Date.	Checks in Detail.	Total Checks.	Deposits.
	1890.			
Nov.	1.	Balance Ledger 3 ; Page 131.....	188,200 00	157,052 21
	1.	10,000—2.10—59.05—65—18....	10,139 15	
	2.	.85—3—100.....	103 85	
	5.	225—21—5—15,000.....	15,251 00	242 50 15,000 00 500 00
	6.	.....	480 39	
	7.	4.70—100—4.42 ..	109 12	
	8.	3—8 ..	11 00	
	10.	5—206.66—10—24.75—1087....	1,333 41	
821	11.	20—40 ..	60 00	
	12.	4.75—63.56 ..	68 31	
	13.	.....	25 00	
	17.	33.25—40 ..	73 25	
	19.	.....	15 75	
	20.	.....	2 90	
	21.	793.05—325 ..	1,118 05	
	22.	1,000—200—250 ..	10,450 00	
	24.	79.62—8.75 ..	88 57	
	25.	Balance.....		4,734 84
		102 Checks Ret'd.....	177,529 55	177,529 55
Nov.	25.	Balance.....	4,734 84	
	26.	.....	24 00	1,000 00
	28.	.....	5 00	
Dec.	1.	25—5. Waterman....	30 00	501 50 50 00
822	2.	3—8—6—14.75.....	31 75	
	3.	.....	25 00	
	4.	55—10.20.....	65 20	
	5.	4,000— .15.....	4,000 15	
	6.	10—10.....	20 00	
	8.	3—25—224.20—6.45—86.50....	345 15	15,000 00
	10.	Taylor Div.....		330 05
	11.	50—13.35—1—150.70 ..	205 05	10 40
	12.	1—100 ..	101 00	
	13.	50—1,000. Stebbins.....	10,050 00	10,000 00
	15.	R. W. Waterman.....	5 00	350 00
	16.	.....	5 00	
	17.	.....	1 00	
	18.	1—400.....	401 00	
	19.	10—30 ..	40 00	
	22.	3,500—12,000 c/o San Cal. Nat....	15,500 00	12,000 00

Date.	Checks in Detail.	Total Checks.	Deposits.	823
1890.				
23.	8,813.59—20.75—20—10.....	8,864 34		
24.	.....	278 36		
26.	C/o Ken Mills Deal	5 00	54 80	
27.	.....	25 92		
29.	28.88—25—1,000.....	1,033 88		
30.	Sal		1,000 00	
31.	15,000—4.46—62 64.....	15,067 10		
1891.				
Jan. 2.	290— .60—235.25—2.85—5. Bal. Waterman Clif. McL. & Y.	533 70	150 50	
Jan. 2.	290—60—235.25—2.85—5. Bal. Waterman.....	533 70	150 00	
5.	5—41.73	46 73		
6.	17.25—65—4—1,001.....	1,087 25		
7.	.....	1 00		
9.	200—10.....	210 00		
12.	1/2 S. Sacks No. 4		312 50	824
	Div. No. 4.....		1,345 00	
14.	.....	5 00		
15.	.....	120 00		
16.	Div. Mtg. Co.....		125 00	
19.	Capron chg. D. & S.		11,087 51	
20.	.....	21 00		
25.	.....	15 00		
22.	D. D. D. OD 256.66.....	62,933 42	300 00	
	.....		62,666 76	
29.	60—25—2	87 00		
30.	.....		3,483 18	
1892.				
2.	866.66—100—150—10.75.....	627 41		
	.....	63,647 83	66,149 94	
4.	Mtg. Co.		50 00	
7.	14.10—300	314 10	698 50	
	.....		125 00	
7.	.....		1,000 00	825
10.	.....		58 75	
11.	314—70	384 00		
12.	.....	106 40		
14.	D. & C.....		250 00	
16.	10—20—3.50—1,000.....	1,033 50		
17.	13.45—5,800—100.....	5,913 45		
20.	.....	1,000 00	1,000 00	
21.	.....		12,000 00	
24.	.....	80 00		
26.	.....	120 00		
1893.				
2.	5.20—1,000	1,005 20		
4.	100—40	140 00		
5.	.....	25 00		

826	Date, 1893.	Checks in Detail.	Total Checks.	Deposits.
	6.	.....	1,000 00	1,875 00
	7.	5 N. Waterman	218 55	250 00
	9.	.....		1,534 98
	10.	9—27	36 00	1,000 00
	11.	.....	2,500 00	
	12.	16—129,55—50	195 50	20,456 21
	13.	5—5	10 00	
	14.	100—750—68 30—150	1,068 90	
	17.	.....	100 00	
	18.	7,50—10,000	10,007 50	10,000 00
	19.	.....	762 32	762 32
	21.	.....	1 50	
		..... 27,590 90	89,619 80	119,210 70
	24.	.....	375 00	
	25.	Union Nat. Chgo. Nat. Park, Stebbins		25,000 00
827	26.	.....	5 00	20,000 00
	27.	25,000 — 5,555.60 — 1,214.84 — 4,760.65—12,000—500—6,000— 4,170—100	59,391 09	
	30.	.....		1,230 00
	2.	14,70—1.25—557.78	573 73	
	3.	10—31.25	41 25	
	4.	.....	100 00	
	6.	.....	60 00	
	7.	40—10,776.48—513.70—47	11,377 18	
	8.	1,000—5—31,50—18.50	1,085 00	
	9.	.....	120 00	12,500 00
	10.	.....	40 00	
	11.	.....		500 00
	13.	.....		3,750 00
	14.	.....	15 55	
	16.	.....		4,500 00
828	17.	.....	76 38	
	18.	1,500—85	1,585 00	
	21.	.....		20,000 00
	22.	.....	219 87	
	25.	100—27.70	127 70	
	27.	500—2,000.00—5	2,505 00	
	28.	.....	414 00	
1895.				
	2.	100—5,50—440	515 50	40,000 00
	7.	.....	6 70	383 00
	8.	1,666.66—52	1,718 66	16,000 00
	9.	.....	5 00	
	12.	.....	7 40	
	15.	.....	1,995 15	1,250 00
	14.	4—8,500	8,504 00	
			179,323 96	262,323 70

Date.	Checks in Detail.	Total Checks.	Deposits.	829
Page 121.				
May 16.	.....	5 00		
18.	84.59—1,000	1,084 59		
19.	.....	366 50		
20.	1,260—200	1,460 00		
22.	.....	12 00		
23.	60—583.33	643 33		
25.	350—60—72.50	482 50		
26.	1,610—50	1,660 00		
1886.				
1.	.....		5,880 00	
4.	.....	306 67		
6.	.....		20,000 00	
10.	173.08—400	573 08		
13.	.....	20,000 00		
16.	25.40—150	175 40		
20.	H. Wagner		550 00	850
27.	25 200—60—50,000	50,285 00		
29.	1,000—2,000—1,000	4,000 00		
30.	4—50	54 00		
1.	.....	25 00		
2.	.....	18 00		
3.	100—102.41—2,551.67	2,854 08		
6.	.....	122 50		
7.	20,000—5—75.89	20,080 89		
8.	.....	151 11		
9.	4.85—10	14 85		
11.	7,500—60—100	7,660 00		
15.	M. L. I. Co. Div. No. 5		125 00	
20.	.....	140 00		
21.	.....	40 00		
23.	50,000—80	50,080 00	85,000 00	
			39,145 34	
24.	318—50	368 00		
25.	.....	10,840 81		831
27.	60—842.72—50	952 72		
29.	.....	2 00		
30.	50—195.20	245 20		
31.	S. Gate Building		264 00	
31.	Spreckels B.		20,000 00	
31.	S. B. St. La.		10,000 00	
	L. 5 Page 134	334,227 19	413,288 04	
1887.				
Aug. 1.	.....	1,500 00		
3.	.....		839 13	
4.	.....		1,385 00	
5.	.....	5,880 00		
6.	.....	1 00		
7.	.....	98 05		

Date.	Checks in Detail.	Total Checks.	Deposits.	835
1887.				
26.	123.95—5,000.	5,123.95		
27.	.....	10,000.00		
30.	.....	11,000.00		
31.	1st Chic. West, N. Y.	268.88	20,000.00	
Nov. 3.	Metcalf.	90.00	8.53	
4.	.....	425.00		
6.	C. S. Bank		8,250.00	
7.	.....	4,400.00		
9.	8,500—475—10,000.	18,975.00		
		537,036.07	538,511.07	
10.	1,521.50—270.65—11,250—511.95 —2,010—20,000.	35,564.10	10.00	
11.	.....		500.00	
1892.				
Jan. 14.	.....	350.00		
2.	.....	19,500.00		836

The foregoing bill of exceptions contains all of the evidence in any way material to any of the facts in issue.

The defendant by its counsel prays that this its bill of exceptions might be signed and sealed, and it is signed and sealed accordingly.

WM. J. WALLACE,

Circuit Judge.

Gentlemen:

Please take notice that the within is defendant's bill of exceptions in the action therein entitled.

Dated January 5, 1895.

Yours, &c.,

837

HENRY C. WILLCOX,

Attorney for American Surety Company,
160 Broadway,
New York City.

To Messrs. MITCHELL & MITCHELL,

Plaintiff's Attorneys,

To THE CLERK OF THE UNITED STATES CIRCUIT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

(Endorsed).—United States Circuit Court, Southern
District of New York.—Frederick N. Pauly, as
Receiver of the California National Bank of San

838

Diego, California, Plaintiff, against American Surety Company of New York, Defendant.—Action No. 1.—Bill of Exceptions.—Henry C. Willcox, Attorney for Defendant, No. 160 Broadway, New York City, N. Y.—Service of a copy of the within Bill of Exceptions, &c., is hereby admitted this 5 day of Jan'y., 1895.—Mitchell & Mitchell, Plffs. Attys.—U. S. Circuit Court.—Filed Mar. 27, 1895.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

839

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California,

Plaintiff,

AGAINST

AMERICAN SURETY COMPANY OF
New York,
Defendant.

At Law.
Assignment of
Errors.

Action No. 1.
(O'Brien,
Cashier.)

840

The defendant in this action, in connection with its petition for writ of error, avers:

That in the record and proceedings in this action, and also in the matters recited and contained in the bill of exceptions, and also in the giving of the verdict and judgment aforesaid, there is manifest error, in that the Judge presiding at said Circuit, against the objection of the defendant, made the following rulings, each of which was erroneous and to the injury of the defendant, to wit:

1. During the examination of Chas. L. Brimhall, 841
a witness for plaintiff, after the witness had testified that the account of Mr. Collins was on page 120 of Ledger 4, and as to the manner of keeping said account, said Judge erroneously permitted plaintiff's counsel to put said account in evidence.

2. During the examination of said Brimhall, immediately after the last mentioned ruling, said Judge erroneously permitted plaintiff's counsel to ask the witness, "Will you please look at the date of September 21, 1891, and state what the apparent balance in that account is?"

3. During the examination of said Brimhall, after the witness had stated that the account on page 120 of Ledger 4 was continued in Ledger 5, said Judge erroneously permitted plaintiff's counsel to ask the witness, "You may state what you know about those entries that were made after the suspension of the bank," and said witness to reply, "I know that they are charged up here, one is a charge of \$350, on January 14, 1892." 842

4. During the examination of said Brimhall, after the witness had testified that the regular ledger account of Collins closed on November 11, 1891, said Judge erroneously permitted plaintiff's counsel to ask of the witness, "What was the seeming balance at that time?" 843

5. During the examination of said Brimhall, after said witness had stated that the apparent balance to the credit of Mr. Collins on November 11, 1891, was \$11,420.90, said Judge erroneously permitted plaintiff's counsel to ask the witness, "Do you find on the credit side of that account, on or about the 13th day of October, 1891, a credit of \$24,500? Just read what you find."

6. During the examination of said Brimhall the witness replied to the question thus asked, "A credit

844 of \$20,000, from the Western National, and \$24,500 from the United States National," and thereupon said Judge erroneously denied defendant's motion to strike out the said answer.

7. During the examination of said Brimhall, immediately after the last mentioned ruling, said Judge erroneously permitted plaintiff's counsel to put in evidence notice and proof of claim, dated June 24, 1892, directed to the American Surety Co. of New York, and marked Plaintiff's Exhibit "A."

845 8. During the examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to ask the witness, "What, if any, entry do you find credited J. W. Collins under date October 31, 1891?"

9. During the examination of said Brimhall, after said witness had stated that there was an item to the credit of Mr. Collins on the 14th of October, said Judge erroneously permitted plaintiff's counsel to ask the witness, "What is that on the 14th?"

10. During the examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "I" a certain deposit tag of \$24,500, dated October 13, 1891.

846 11. During the examination of said Brimhall, immediately after the ruling aforesaid, said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "J" a certain deposit tag of \$20,000, dated October 13, 1891.

12. During the examination of said Brimhall, immediately after his ruling aforesaid, said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "K" a certain deposit tag of \$500, dated October 14, 1891.

13. During the examination of said Brimhall, immediately after the ruling aforesaid, said Judge

erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "L," a certain deposit tag of \$20,000, dated October 31, 1891. 847

14. During the examination of said Brimhall, after the witness had testified that certain entries in the Teller's Book of the California National Bank were in the handwriting of Mr. Gregg, said Judge erroneously permitted plaintiff's counsel to put the said book in evidence as Plaintiff's Exhibit "M."

15. During the examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibits "N" and "O" two certificates of deposit known by the numbers 6800 for \$7,500, and 6801 for \$8,500, respectively, and dated September 22, 1891. 848

16. During the examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "P" a certain check for \$16,000, dated September 22, 1891, and signed by J. W. Collins.

17. During the examination of said Brimhall, immediately after the ruling aforesaid, said Judge erroneously permitted plaintiff's counsel to ask the witness, "Will you turn to the Ledger account, and state whether, on or about that date, there is any debit against Mr. Collins' account?" 849

18. During the examination of said Brimhall, immediately after the ruling last aforesaid, said Judge erroneously permitted plaintiff's counsel to ask the witness, "Was that check ever charged to Collins' account?"

19. During the examination of said Brimhall, immediately after the ruling last aforesaid, said Judge erroneously permitted plaintiff's counsel to ask the witness, "Did it ever go into the teller's cash at all?"

850 20. During the examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to put in evidence said check as Plaintiff's Exhibit "Q," a check for \$25,000, dated May 25, 1891, and purporting to be signed by J. W. Collins.

21. During the examination of said Brimhall, immediately after the ruling aforesaid, said Judge erroneously permitted plaintiff's counsel to ask the witness: "Was that check ever charged against J. W. Collins in the account?"

851 22. During the examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to ask the witness: "The next one is July 20, 1891; was that check ever charged against Mr. Collins' account?"

23. During the examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "R" a certain check for \$20,000, dated July 20, 1891, and purporting to be signed by J. W. Collins.

852 24. During the examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "S" a certain check for \$15,000, dated September 16, 1891, and purporting to be signed by J. W. Collins.

25. During the examination of said Brimhall immediately after the ruling last aforesaid, said Judge erroneously permitted plaintiff's counsel to ask the witness: "Was that ever entered against J. W. Collins?"

26. During the examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibits "T" and "U" certain notes marked Plaintiff's Exhibit "T" and "U" respectively, one for \$51,038.35, dated

August 22, 1891, and purporting to be signed by J. W. Collins; and one for \$6,659, dated September 15, 1891, and purporting to be signed by J. W. Collins. 853

27. During the redirect-examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "V" a certain check for \$19,500, dated November 9, 1891, and purporting to be signed by J. W. Collins.

28. During the redirect-examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "W" a certain deposit slip for \$25,000, dated March 3, 1891. 854

29. During the redirect examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "X" a certain deposit slip for \$20,000, dated June 6, 1891.

30. During the redirect-examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "Y" a certain package of deposit slips.

31. During the examination of George S. Hickok, a witness for plaintiff, said Judge erroneously permitted plaintiff's counsel to ask the witness, "Will you state what the transaction was?" 855

32. During the examination of said Hickok said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "AA" a certain note for \$25,000, dated April 1, 1891.

33. During the examination of said Hickok said Judge erroneously permitted plaintiff's counsel to ask the witness, "What was the transaction?"

856 34. During the examination of said Hickok said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "BB" a certain note for \$20,000, dated June 3, 1891.

35. During the examination of said Hickok said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "CC" a certain renewal note for \$25,000, dated August 4, 1891.

36. During the examination of Henry A. Smith, a witness for plaintiff, said Judge erroneously permitted plaintiff's counsel to ask the witness, "Will you please state what the transaction was?"

857 37. During the examination of said Smith said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "DD," a certain note for \$20,000, dated October 12, 1891.

38. During the examination of Henry C. Hopkins, a witness for plaintiff, said Judge erroneously permitted plaintiff's counsel to ask the witness, "What was the transaction?"

858 39. During the examination of said Hopkins said Judge erroneously permitted plaintiff's counsel to ask the witness, "Please state what that transaction was?"

40. During the examination of said Hopkins said Judge erroneously permitted counsel for plaintiff to put in evidence as Plaintiff's Exhibit "FF" a certain note of \$17,500, dated October 13, 1891.

41. During the examination of Harry B. Fonda, a witness for the plaintiff, said Judge erroneously permitted plaintiff's counsel to ask the witness, "Will you look and see what, if any, transaction your bank had in reference to a certificate of deposit of the California National Bank?"

42. During the reading of the deposition of Samuel N. Wood, a witness for plaintiff, said Judge erroneously permitted plaintiff's counsel to read in evidence a question asked the witness: "State whether or not, during the time you were cashier of the first National Bank of Denver, you ever had any transaction with Mr. Collins in which the California National Bank of San Diego, California, was interested, or in any way appeared?" 859

43. During the reading of the deposition of said Wood said Judge erroneously denied a motion made by defendant's counsel to strike out the answer to the question last referred to,

44. During the reading of the deposition of said Wood said Judge erroneously permitted plaintiff's counsel to read in evidence the question asked the witness: "If you have those certificates of deposit, please attach them hereto, if not, please describe the kind of certificates they were?" and the answer thereto. 860

45. During the reading of the deposition of said Wood said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibits "HH," "II" and "JJ," three certificates of deposit, each to the order of J. W. Collins and dated May 23, 1891; two for \$7,500 each and one for \$10,000. 861

46. During the reading of the deposition of said Wood said Judge erroneously permitted plaintiff's counsel to read in evidence the following question: "Please state in full what conversation you had, if any, with Mr. Collins, in regard to said certificates, and what application he made of the money raised upon them, if you know."

47. During the reading of the deposition of John C. Mitchell, a witness for the plaintiff, said Judge erroneously permitted plaintiff's counsel to read in

862 evidence the following question: "State whether or not at any time either as an individual or as Cashier of the Denver National Bank, you had any transaction with Mr. Collins, in which the California National Bank of San Diego was in any way interested or connected, and if so, state what transaction took place and what it was?" together with his answer thereto.

863 48. During the reading of the deposition of said Mitchell said Judge erroneously permitted plaintiff's counsel to read in evidence the question asked the witness: "State if you know whether at the said time or at any time, any account existed in the books of the Denver National Bank between any of the officers of the California National Bank of San Diego, and especially with Mr. Collins?" together with the answer of the witness thereto.

49. During the reading of the deposition of said Mitchell said Judge erroneously permitted plaintiff's counsel to read in evidence the question asked the witness: "Please state fully the whole transaction had with the said John W. Collins, in relation to placing said credit, the ownership of said draft, the party for whom the negotiations were conducted and what, if anything, was said as to who was entitled to the proceeds of said \$25,000 draft?" together with the answer thereto.

864 50. During the reading of the deposition of C. J. White, a witness for the plaintiff, said Judge erroneously permitted plaintiff's counsel to read in evidence the question asked the witness: "Please state whether the National Bank of Commerce had any dealings with the California National Bank of San Diego, on or about December 15th, 1890; and if so, state what the dealings were?" together with the answer of the witness thereto.

51. During the reading of the deposition of said White said Judge erroneously permitted plaintiff's

counsel to read in evidence the question asked the witness: "And what sum, if any, was placed to the credit of the California National Bank of San Diego?" and the answer of the witness thereto. 865

52. During the reading of the deposition of said White said Judge erroneously permitted plaintiff's counsel to read in evidence the question asked the witness: "Was that note ever liquidated by the California National Bank, and if so, state when?" and the answer of the witness thereto.

53. During the reading of the deposition of said White said Judge erroneously permitted plaintiff's counsel to read in evidence the question asked the witness: "Well, please state whether or not, you mean to state that on December 15th, 1890, the California National Bank received credit in your bank to the amount of \$25,000?" together with the answer of the witness thereto. 866

54. During the reading of the deposition of said White said Judge erroneously permitted the plaintiff's counsel to put in evidence as Plaintiff's Exhibit "KK" a letter mentioned in said deposition, dated February 10, 1891, from George N. O'Brien.

55. During the reading of the deposition of said White said Judge erroneously permitted plaintiff's counsel to read in evidence the question asked the witness: "I will get you to state if the National Bank of Commerce had a transaction with the California National Bank, about the 15th of April, 1891?" together with the answer of the witness thereto. 867

56. During the reading of the deposition of said White said Judge erroneously permitted plaintiff's counsel to read in evidence the question asked the witness: "What was the nature of that?" together with the answer of the witness thereto.

868 57. During the reading of the deposition of Lyman J. Gage, a witness for plaintiff, said Judge erroneously permitted plaintiff's counsel to read in evidence the question asked the witness: "Please state what you recollect with reference to the negotiation of a loan that Mr. J. W. Collins had with your bank, in the spring of 1891; a loan of \$25,000?" together with the answer of the witness thereto.

869 58. During the reading of the deposition of said Gage said Judge erroneously permitted plaintiff's counsel to read in evidence the question asked the witness: "Was anything said at that time or any subsequent time, with reference to loaning this money to Mr. Dare, Havermale and other parties, whose names were signed to that note?" together with the answer of the witness thereto.

59. During the reading of the deposition of John P. Odell, a witness for plaintiff, said Judge erroneously permitted plaintiff's counsel to read in evidence the question asked the witness: "State whether or not you recall a certain transaction in which your bank made a loan of \$20,000 on a note signed by S. G. Havermale, J. W. Collins and D. D. Dare, endorsed by the California National Bank some time in March, 1891?" together with the answer of the witness thereto.

870 60. During the reading of the deposition of said Odell said Judge erroneously permitted plaintiff's counsel to read in evidence the question asked the witness: "In what way was the loan made; by way of discount or otherwise?" together with the answer of the witness thereto.

61. During the reading of the deposition of said Odell said Judge erroneously permitted plaintiff's counsel to read in evidence the question asked the witness: "Do you recollect whether or not at the time the California National Bank closed in Novem-

ber, 1891, there was anything at your bank from the California National Bank?" together with the answer of the witness thereto. 871

62. At the close of the reading of the deposition of said Odell said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "MM," a certain letter dated April 11, 1891, signed George N. O'Brien, and addressed to W. S. Woods, president.

63. During the examination of William D. Bloodgood, a witness for plaintiff, said Judge erroneously permitted plaintiff's counsel to ask the witness: "When did you discover the transactions of September 22, 1891; the 13th and 14th of October, and the 31st of October, 1891, which are detailed in that paper?" 872

64. During the examination of said Bloodgood said Judge erroneously permitted plaintiff's counsel to ask the witness: "What does it show?"

65. During the examination of said Bloodgood said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "J1", a certain document or statement.

66. At the close of plaintiff's case the said Judge erroneously overruled and denied the defendant's motion to dismiss the plaintiff's complaint. 873

67. During the examination of W. L. Trenholm, a witness for defendant, defendant's counsel offered in evidence the application of Mr. Collins for a bond for his fidelity as president of the California National Bank, which the Judge erroneously ruled out.

68. During the reading of the deposition of Theodore R. Gay said Judge erroneously refused to permit defendant's counsel to read the following

874 question asked the witness: "Now, from what you learned in the course of your business connections with Mr. Collins, and from your discussions with other people concerning him, what would you say was Mr. Collins' reputation for financial standing in San Diego up to the 1st day of November, 1891?" together with the reply of the witness thereto.

69. During the reading of the deposition of Frederick N. Pauly, a witness for the plaintiff, said Judge erroneously permitted plaintiff's counsel to read the question asked the witness: "When was that examination of the books complete to such an extent that you had a specific knowledge of the various things?"
875 together with the reply of the witness thereto.

70. During the reading of the deposition of Frederick N. Pauly, a witness for the plaintiff, said Judge erroneously permitted plaintiff's counsel to read the question asked the witness: "From what source did you learn these facts specifically, so as to be assured?" together with the reply of the witness thereto.

71. At the close of the testimony the said Judge erroneously denied the motion of the defendant to dismiss the plaintiff's complaint.

72. At the close of the testimony the said Judge
876 erroneously denied the motion of the defendant to direct a verdict for the defendant.

73. Said Judge erroneously declined to charge, as requested by the defendant, that "there can be no recovery in this action upon or by reason of Certificate of Deposit No. 6800 for the sum of \$7,500."

74. Said Judge erroneously declined to charge, as requested by the defendant, that "there can be no recovery in this action upon or by reason of Certificate of Deposit No. 6801 for \$8,500."

75. Said Judge erroneously declined to charge, as requested by the defendant, that "there can be no recovery in this action for or by reason of the loan of \$25,000 from the United States National Bank of New York on or about the 13th or 14th day of October, 1891, nor for or by reason of any credit alleged to have been given by reason of such loan." 877

76. Said Judge erroneously declined to charge, as requested by the defendant, that "there can be no recovery in this action for or by reason of the loan of \$20,000 from the Western National Bank on or about the 13th or 14th day of October, 1891, nor for or by reason of any credit alleged to have been given by reason of such loan." 878

77. Said Judge erroneously declined to charge, as requested by the defendant, that "there can be no recovery in this action for or by reason of the credit of \$10,000 on the 31st day of October, 1891, which was afterwards charged back to the account of Collins before the failure of the bank."

78. Said Judge erroneously declined to charge, as requested by the defendant, that "there can be no recovery in this action for or by reason of the other credit of \$10,000 on the 31st day of October, 1891, claimed by plaintiff to be connected in some way with a transaction with the First National Bank of Chicago?" 879

79. Said Judge erroneously declined to charge, as requested by the defendant, that "there can be no recovery in this action for or by reason of any of the bank's assets mentioned in the bill of particulars as having been used by Collins as collateral, either with the United States National Bank or the Western National Bank."

80. Said Judge erroneously declined to charge, as requested by the defendant, that "if the jury find

880 upon the evidence that the plaintiff did not, as soon as it came to his knowledge that O'Brien had been guilty of an act or acts which might involve a loss to be claimed of the Surety Company under the bond, notify said company as soon as practicable after obtaining such knowledge, then there can be no recovery in this action. He could not delay giving such notice until he had actually discovered that such act or acts did involve loss."

881 81. Said Judge erroneously declined to charge, as requested by the defendant, that "if the jury find upon the evidence that on or before the first day of February, 1892, Mr. Pauly knew of any act of O'Brien which might involve a loss to the Surety Company, under the bond in suit, then they must find a verdict for the Surety Company."

82. Said Judge erroneously declined to charge, as requested by the defendant, that "if the jury find upon the evidence that on or before the first day of March, 1892, Mr. Pauly knew of any act of O'Brien which might involve a loss to the Surety Company, under the bond in suit, then they must find a verdict for the Surety Company."

882 83. Said Judge erroneously declined to charge the jury, as requested by the defendant, that "if the jury find upon the evidence that on or before the first day of April, 1892, Mr. Pauly knew of any act of O'Brien which might involve a loss to the Surety Company, under the bond in suit, then they must find a verdict for the Surety Company."

84. Said Judge erroneously declined to charge, as requested by the defendant, that "if the jury find upon the evidence that on or before the first day of May, 1892, Mr. Pauly knew of any act of O'Brien which might involve a loss to the Surety Company, under the bond in suit, then they must find a verdict for the Surety Company."

85. Said Judge erroneously declined to charge, as requested by the defendant, that "If the jury find upon the evidence that the plaintiff did not serve upon the Surety Company written proof of his claim as soon as practicable after the discovery of any loss occasioned by the acts of O'Brien, then there can be no recovery in this action, and by serving such proof of claim 'as soon as practicable' is meant that the plaintiff must have served it as soon as by the exercise of reasonable diligence he was able to draw and verify such written proof of claim and transmit it to the company." 883

86. Said Judge erroneously declined to charge, as requested by the defendant, that "If the jury find upon the evidence that on or before the first day of March, 1892, Mr. Pauly knew of any of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company." 884

87. Said Judge erroneously declined to charge, as requested by the defendant, that "If the jury find upon the evidence that on or before the first day of April, 1892, Mr. Pauly knew of any of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company."

88. Said Judge erroneously declined to charge, as requested by the defendant, that "If the jury find upon the evidence that on or before the first day of May, 1892, Mr. Pauly knew of any of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company." 885

89. Said Judge erroneously declined to charge the jury, as requested by the defendant, that "There can be no recovery in this action upon any item of claim made at this trial unless a claim in regard to such item was set forth in the proof of claim served upon the defendant in July, 1892, nor unless such item of

886 claim has been proved upon this trial as it was set forth in said proof of claim."

90. Said Judge erroneously declined to charge, as requested by the defendant, that "If the jury find upon the evidence that Collins gave to the bank his check for \$10,000 to apply against one of the credits of the \$10,000 each of October 31, 1891, and that the bank received and used this check, charging it against him in his account, then there can be no recovery on account of that credit of \$10,000."

887 91. Said Judge erroneously declined to charge, as requested by defendant, that "Before any recovery can be had in this action upon either of the certificates of deposit numbered 6800 and 6801 the plaintiff must show that it was dishonestly or fraudulently issued by O'Brien; that it was used for Collins' own personal benefit instead of for the bank, and that the bank has suffered loss thereby."

888 92. Said Judge erroneously declined to charge, as requested by the defendant, that "Even if the jury find that the credits of \$25,000 and \$20,000 for which plaintiff seeks to recover were fraudulent and dishonest to the knowledge of O'Brien, that alone does not make out the plaintiff's claim. He must show that a loss resulted from these credits, and in considering this latter question the jury must not regard the alleged earlier false credits that have been given in evidence. These earlier credits have no legitimate bearing upon this question of loss from the latter ones."

93. Said Judge erroneously declined to charge, as requested by the defendant, that "There can be no recovery in this action for or by reason of any of the items here claimed unless the jury find upon the evidence that O'Brien was guilty of some conduct in respect to that item which can properly be considered dishonest or fraudulent. It would not be

enough for the plaintiff to show merely that for 889
some reason or other Collins was not entitled to the
money sought to be recovered."

94. Said Judge erroneously declined to charge, as
requested by the defendant, that " Before a recovery
can be had upon any one of the alleged false credits
mentioned upon this trial it must be shown by the
plaintiff that such credit was actually a false credit.
The credit itself as entered upon the books of the
bank was in itself an admission binding upon the
bank and upon this plaintiff that the bank had re-
ceived from Collins money or value to the amount
of the credit, and this admission must in some way
be overthrown by the plaintiff before he can claim 890
to recover for or by reason of that credit."

95. Said Judge erroneously declined to charge, as
requested by defendant, that " The books and papers
of the bank are not of themselves, nor are any en-
tries therein, binding upon this defendant or evi-
dence against it, and the jury must not accept as
evidence any entries therein unless established by
the testimony of some witness having personal
knowledge of the transaction to which the entry
relates, and establishing such transaction by means
of such knowledge."

96. Said Judge erroneously declined to charge, as 891
requested by defendant, that " There can be no re-
covery in this action for or by reason of any act of
the cashier, O'Brien, which the jury shall find upon
the evidence to have been a mere error of judgment
or an injudicious exercise of discretion, or which was
done by him in good faith in pursuance of any direc-
tion, instruction or authorization received by him
from any duly authorized officer of the bank, or any
act which the jury may find that he performed, be-
lieving it to be done in the course of a transaction
for and on behalf of the bank itself."

892 97. Said Judge erroneously declined to charge, as requested by defendant, that "The plaintiff cannot recover in this action merely because O'Brien was careless or even stupid in the discharge of his duties as cashier, no matter how much loss was thereby occasioned to the bank."

98. Said Judge erroneously declined to charge, as requested by defendant, that "If the jury find upon the evidence that the cashier, O'Brien, did not act dishonestly or fraudulently with reference to any of the items claimed upon this trial, but believed in good faith from his knowledge of the prior course of business that the transactions in which he is charged
893 to have participated although carried on in the name of Collins were in reality for account and benefit of the bank, then there can be no recovery in this action, because of the part which he took in any such transactions."

99. Said Judge erroneously declined to charge, as requested by the defendant, that "In considering the question whether or not any loss for which plaintiff seeks to recover was occasioned by dishonest and fraudulent acts on the part of O'Brien or whether it was the result of acts which could not be called either dishonest or fraudulent, the jury are entitled to consider, if there are any doubts about the facts,
894 the previous good character and good reputation of O'Brien, if they shall find that the previous character and reputation were good."

100. Said Judge erroneously declined to charge, as requested by defendant, that "The law presumes in the first instance that O'Brien was innocent of any fraud or dishonesty in connection with any of the transactions on account of which plaintiff seeks to recover; and even if Collins himself were defrauding or robbing the bank in any way the law presumes that O'Brien did not understand this to be the case, and was not aiding Collins in so doing."

This presumption will of itself be enough to defeat the plaintiff unless he can in some way overthrow it." 895

101. Said Judge erroneously declined to charge, as requested by defendant, that "The plaintiff has not overthrown the presumption of innocence and honesty on O'Brien's part, unless there is evidence in the case that cannot be reconciled with such innocence and honesty. If all the facts in evidence taken together in their proper relation to each other permit the belief that O'Brien was innocent, if it leave room for any inference of an honest intent, the plaintiff has failed to make out his case and cannot recover." 896

102. Said Judge erroneously declined to charge the jury, as requested by the defendant, that "If the jury come to the conclusion upon the evidence that upon all the facts and circumstances known to O'Brien he might have believed in good faith that there was nothing wrong about Collins' transactions as to which plaintiff seeks to recover, then they will render a verdict for the Surety Company."

103. Said Judge erroneously declined to charge, as requested by defendant, that "The plaintiff is bound to convince the jury upon the evidence that O'Brien must have known and did know that the transactions of Collins upon which a recovery is here asked were dishonest and fraudulent. If he fails to satisfy the jury of this, they must render a verdict for the Surety Company." 897

104. Said Judge erroneously declined to charge, as requested by defendant, that "On the question of fraud or dishonesty the burden of proof is on the plaintiff from the first to last."

105. Said Judge erroneously declined to charge, as requested by defendant, that "If the jury find upon

898 the evidence that Collins acted for the bank in procuring the bond sued on, and that before procuring this bond he had been guilty of dishonest and fraudulent conduct in connection with his duties as president, and that this fact was known to O'Brien but was concealed from the Surety Company, then there can be no recovery in this action.

106. Said Judge erroneously declined to charge, as requested by the defendant, that "If the jury find that, at the time of making application for or receiving the bond in suit, any person acting for the bank represented to the Surety Company that the accounts of the cashier, O'Brien, had been examined and had been found to be correct, and that
899 the Surety Company relied upon such representations, when in truth those accounts showed prior to this time that Collins had been guilty of dishonest and fraudulent conduct in connection with his duties as president of the bank, then there can be no recovery in this action."

107. Said Judge erroneously declined to charge, as requested by defendant, that "If the jury find that at the time of making application for the bond in suit any person acting for the bank falsely and fraudulently, and with knowledge to the contrary, represented to the Surety Company that the accounts of the cashier, O'Brien, had been examined and had
900 been found to be correct, when in truth those accounts show that prior to this time Collins had been guilty of dishonest and fraudulent conduct in connection with his duties as president of the bank, then there can be no recovery in this action."

108. Said Judge erroneously declined to charge, as requested by the defendant, that "If the jury find upon the evidence that the bond in suit was procured by concealment or misrepresentation of any facts showing prior dishonest or fraudulent conduct on the part of O'Brien, then the plaintiff cannot re-

cover, no matter who was guilty of such concealment or misrepresentation. The bank cannot now enforce the bond without being affected by the consequences of such concealment or misrepresentation." 901

109. Said Judge erroneously declined to charge, as requested by defendant, that "If the jury find upon the evidence that a reasonable amount of care exercised in the supervision of the president and cashier of the bank and in the examination of its books and papers would have disclosed the fact that Collins had been guilty of dishonest and fraudulent conduct in connection with the performance of his duties as president of the bank, and that the directors or the other officers of the bank wrongfully and negligently omitted to exercise such supervision and make such examination, the bank cannot under these circumstances take from the Surety Company a bond to answer for the faithful performance by Collins of the same duties in the future, and hold the Surety Company responsible for similar misconduct on his part thereafter, and there can be no recovery in this action." 902

110. Said Judge erroneously declined to charge, as requested by defendant, that "In the event of finding a verdict for such amounts, if any, as the evidence shows that the bank has actually lost through or by reason of the certificates of deposit, or the various credits which have been spoken of on the trial; in the case of the certificates of deposit the loss would be such amounts, if any, as the bank has been shown to have been compelled to pay prior to the beginning of this action to regain possession thereof." 903

111. Said Judge erroneously declined to charge, as requested by defendant, that "If the jury find a verdict for the plaintiff, they will render a special verdict stating the items of claim for or on account of which the verdict is rendered, and the amount of

904 the loss which they find to have been sustained by the bank on account of each of such items."

112. Said Judge erroneously charged the jury: "Now it appears without any dispute that at about those dates Mr. Collins, in New York, procured from these two banks" [the United States National of New York and the Western National Bank of New York] "rediscounts of paper belonging to the California National Bank with the United States National Bank of New York in the amount of \$24,500 or about \$25,000, and with the Western National Bank in the amount of about \$20,000. If any sum of money accrued from those transactions or any securities the money or security was the property of
905 the bank and not of Mr. Collins personally, and Mr. Collins personally was not entitled to the two items of credit which were transferred to his account on the dates of October 13 and 14, 1894."

113. Said Judge erroneously charged the jury that "The defendant was entitled to notice in writing of any act of the cashier which came to the knowledge of the plaintiff of a fraudulent or dishonest character as soon as practicable after the plaintiff acquired knowledge. It is not sufficient to defeat the plaintiff's right of action upon the policy that it be shown that the plaintiff may have had suspicions of dishonest conduct of the cashier, but it was the
906 plaintiff's duty, under the policy, when it came to his knowledge—when he was satisfied that the cashier had committed acts of dishonesty or fraud likely to involve loss to the defendant under the bond—as soon as was practicable thereafter, to give written notice to the defendant * * * and in considering this you are to inquire, first, when it was that the plaintiff became satisfied that the cashier had committed dishonest or fraudulent acts which might render the defendant liable under this policy—he may have had suspicions of irregularities—he may have had suspicions of fraud, but he was

not bound to act until he had acquired knowledge of 907
 some specific fraudulent or dishonest act which
 might involve the defendant in liability for the mis-
 conduct."

114. Said Judge erroneously charged the jury,
 referring to the bond in suit, "that bond is in legal
 effect an insurance policy."

115. Said Judge erroneously charged the jury that
 "Now, if it is a fact that the plaintiff was engaged
 more or less in consultation with the United States
 attorney and with the criminal authorities, and that
 his circumstances and situation were such that it
 could not be reasonably expected of him that he 908
 should make out this formal claim and send it before
 the time when he did so, then you can find the
 notice was given within reasonable time and in
 compliance with the condition of the policy."

116. Said Judge erroneously charged the jury that
 "It is said that this bond of indemnity was obtained
 upon an application which was certified to by the
 bank itself, and that in the application facts were
 misrepresented and facts were concealed with fraud-
 ulent intent on the part of the bank, therefore, that
 the bond is void. * * * The only knowledge of
 any facts which ought to have been communicated,
 or were misrepresented—the only knowledge which 909
 the bank possessed at the time that application was
 made—was the knowledge of Collins himself.
 Ordinarily, a corporation, like any other principal,
 is chargeable with the knowledge of any facts
 which are known to its agents, but in this case all
 these transactions, if there were any transactions,
 of a fraudulent and dishonest character on the part
 of the cashier, were transactions for the benefit of
 Collins, and he was a participator in the fraud, and
 under those circumstances the law does not infer
 that the agent or the officer will communicate the
 fact to its principal, the corporation, and under

910 such circumstances the corporation is not bound by his knowledge, so this defense melts away and there is nothing of it whatever."

117. Said Judge, after the charge, and in reply to the following question by a juror. "If they (meaning the plaintiff) found out the fraud on the 2d day of March and notified them on the 23d day of May, would that be in law a notice as soon as practicable?" erroneously replied: "No, I should charge in reference to that, that that is a question for you to determine; it is a question of fact and not a question of law."

911 118. Said Judge erroneously after the charge, and in reply to a question of a juror as to whether in coming to a conclusion the jury might look at anything that O'Brien did before October 13th and 14th, which has a bearing, answered, "Oh, yes."

119. Said Judge erroneously after the charge, and during the discussion which arose upon the coming in of the jury for instructions, refused to charge the jury as requested by counsel for the defendant, that if "Mr. O'Brien did what the plaintiff claims, it would be a crime."

912 120. That the verdict in said cause was in favor of the plaintiff, whereas by the law of the land it ought, under the facts of the case, to have been for the defendant.

121. That the judgment below was entered in the said cause in favor of the plaintiff, whereas by law it ought to have been entered in favor of the defendant.

Therefore, the said American Surety Company of New York prays that the judgment aforesaid, by reason of the errors aforesaid, may be reversed, annulled and for nothing holden; that the company

may be restored to all things which said company 913
has lost by occasion of said judgment.

HENRY C. WILLCOX,
Attorney for Defendant, being Plaintiff
in Error,

160 Broadway,
New York City.

GEORGE A. STRONG,

HENRY C. WILLCOX,
Of Counsel.

(Endorsed)—United States Circuit Court, Southern
District of New York.—Frederick N. Pauly, as
Receiver of the California National Bank of San
Diego, California, Plaintiff, against American
Surety Company of New York, Defendant.— 914
At Law—Assignment of Errors.—(Action No.
1).—Henry C. Willcox, Attorney for Defend-
ant, No 160 Broadway, New York City, N. Y.
—U. S. Circuit Court.—Filed Apr. 1, 1895.—
John A. Shields, Clerk.

916

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California,

Plaintiff,

AGAINST

917 AMERICAN SURETY COMPANY OF
NEW YORK,
Defendant.

At Law.

Bond on Writ of Error.

Action No. 1.

(O'Brien, Cashier.)

KNOW ALL MEN BY THESE PRESENTS, that we, the American Surety Company, of New York, as principal, and the Fidelity and Casualty Company of New York, as surety, are held and firmly bound unto the plaintiff, Frederick N. Pauly, as Receiver of the California National Bank of San Diego, California, in the full and just sum of twenty-five thousand dollars, to be paid to the said plaintiff, his certain attorneys, executors, legal representatives or assigns;
918 to which payment, well and truly to be made, we bind ourselves, our successors and legal representatives, jointly and severally by these presents. Sealed with our corporate seals and dated this 27th day of March, 1895.

Whereas, lately at a Circuit Court of the United States, for the Southern District of New York, in an action pending in said Court between Frederick N. Pauly, as Receiver of the California National Bank of San Diego, California, plaintiff, and the American Surety Company of New York, defendant, a judgment was entered against

the said American Surety Company of New York, 919
 and the said American Surety Company of New
 York having obtained a writ of error and filed a
 copy thereof in the Clerk's office of the said Court
 to reverse the judgment in the aforesaid action, and
 a citation directed to the said Frederick N. Pauly, as
 Receiver of the California National Bank of San
 Diego, California, citing and admonishing him to be
 and appear at a session of the United States Circuit
 Court of Appeals for the Second Circuit, to be
 holden at the City of New York, in said Circuit, on
 the 30th day of April next.

Now, the condition of the above obligation is such,
 that if the said American Surety Company of New
 York, shall prosecute said writ of error to effect and 920
 answer all damages and costs if he fail to make the
 said plea good, then the above obligation to be void,
 else to remain in full force and virtue.

Sealed and delivered }
 in presence of— }

L. E. CARMAN.

AMERICAN SURETY COMPANY OF NEW
 YORK,

By DAVID B. SICKELS,
 2d Vice-President.

WM. E. KEYES,
 Secretary.

[SEAL.]

THE FIDELITY AND CASUALTY COM-
 PANY OF NEW YORK,

By GEO. F. SEWARD,
 President.

ROBT. J. HILLAS,
 Secretary.

[SEAL.]

921

922 STATE OF NEW YORK, }
 City and County of New York, } ss.:

On this 27th day of March, 1895, before me personally appeared David B. Sickels, second vice-president of the American Surety Company of New York, with whom I am personally acquainted, who, being by me duly sworn, said: That he resided in the City of New York; that he is the second vice-president of the American Surety Company of New York; that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the board of trustees of said company, and he signed said instrument as second vice-president of said company by like authority. And the said David B. Sickels further said that he was acquainted with Wm. E. Keyes and knew him to be the secretary of said company; that the signature of said Wm. E. Keyes subscribed to the said instrument is in the genuine handwriting of the said Wm. E. Keyes and was thereto subscribed by the like order of the said board of trustees, and in the presence of him, the said David B. Sickels, second vice-president.

L. E. CARMAN,
 Notary Public (No. 17),
 New York Co.

924 Certs. filed in Kings, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk and Rockland Cos.

STATE OF NEW YORK,)
 City and County of New York,) ss.:

925

On this 29th day of March, 1895, before me personally appeared Geo. F. Seward, president of the Fidelity and Casualty Company of New York, with whom I am personally acquainted, who, being by me duly sworn, says: That he resides at East Orange, N. J.; that he is the president of the Fidelity and Casualty Company of New York; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed thereto by order of the Board of Directors of said company, and that he signed said instrument as president of said company, by like authority. And the said George F. Seward further says he is acquainted with Robert J. Hillas, and knows him to be the secretary of said company; that the signature of the said secretary subscribed to the said instrument is in the handwriting of said Secretary, and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him, the said George F. Seward.

926

[SEAL.]

GEORGE A. DEWEY,

Notary Public,

Kings Co.,

Cert. filed in N. Y. Co.

(Endorsed)—United States Circuit Court, Southern District of New York.—Frederick N. Pauly, as Receiver, &c., Plaintiff, against American Surety Company of New York, Defendant.—Action No. 1.—At Law.—Bond on Writ of Error.—Henry C. Willcox, Attorney for Defendant, No. 160 Broadway, New York City, N. Y. —Approved April 1, 1895. E. H. Lacombe, U. S. Circuit Judge.—U. S. Circuit Court.—Filed Apr. 1, 1895.—John A. Shields, Clerk.

927

928 City, County and State of New York, ss.:

WILLIAM C. DOUGLAS, being duly sworn, says: That he is managing clerk in the office of Henry C. Willcox, Esq., attorney for American Surety Company of New York; that on the 3d day of April, 1895, at four o'clock in the afternoon, at the office of Mitchell & Mitchell, No. 44 Wall street, New York City, he served the within citation on Mitchell & Mitchell, attorneys for Frederick N. Pauly as Receiver, &c., by delivering to William Mitchell, of said firm, personally, a true copy of said citation and leaving the same with him.

WILLIAM C. DOUGLAS.

929 Sworn to before me this 4th }
day of April, 1895. }

JOHN C. MOWBRAY,
Notary Public,
Kings Co.
Cert. filed in N. Y. Co.

THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

930 THE UNITED STATES OF AMERICA, } ss.:
Second Judicial Circuit, }

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit, to be holden at the City of New York, in said Circuit, on the 30th day of April next, pursuant to a writ of error filed in the Clerk's office of the United States Circuit Court for the Southern District of New York,

wherein the American Surety Company of New York is plaintiff in error (Action No. 1) and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. 931

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 12th day of April, 1895, and of the independence of the United States of America the one hundred and nineteenth.

E. H. LACOMBE,

U. S. Circuit Judge.

(Endorsed)—United States Circuit Court of Appeals for the Second Circuit. —American Surety Company of New York, Plaintiff in Error, against Frederick N. Pauly, as Receiver, &c., Defendant in Error.— Action No. 1.—Citation.—Henry C. Willcox, Attorney for Plaintiff in Error, No. 160 Broadway, New York City, N. Y. —U. S. Circuit Court.—Filed Apr. 5, 1895.—John A. Shields, Clerk 932



At a Stated Term of the Circuit Court of
the United States for the Southern Dis-
trict of New York, held in the United
States Court House and Post Office
Building, in the City of New York, on
the 30th day of September, 1895.

933

Present—Hon. E. HENRY LACOMBE, *Circuit Judge*.

FREDERICK N. PAULY, as Re-
ceiver of the California Na-
tional Bank of San Diego,
California,

Plaintiff,

AGAINST

THE AMERICAN SURETY COM-
PANY OF NEW YORK,
Defendant.

Action No. 1.

(O'Brien, Cashier.)

2

Upon the consent hereunder written and on
motion of Henry C. Willcox, attorney for the de-
fendant, it is

3

Ordered, that the bill of exceptions in this action
be amended by adding at the end thereof the follow-
ing:

“ Defendant's Exhibit 1, being described as letter
of plaintiff to the Western National Bank of New
York, dated March 28, 1892:

934

4

SAN DIEGO, Cal., March 28th, 1892.

WESTERN NATIONAL BANK,
New York, N. Y.

DEAR SIRs:

The claim herewith enclosed, in your favor, was received from an attorney of New York City and his letter, having been filed under his name, we are not able to find now, his name being forgotten, hence we send the paper direct to you.

935

- The U. S. Attorney advises me that these claims cannot be allowed to be proved against the California National Bank, the overdraft being the only item that I so far see can be admitted to proof.
- 5 The Havermale note is rejected on account of irregularities, under the advice of my attorney. If the California National Bank is indebted to the Western National Bank, so far as I understand the matter, it would be on the balance due upon the note that you say was given to the California National Bank, and this overdraft. I am not prepared to admit, however, that the note that you allude to as a note of the California National Bank to the Western National Bank is a *bona fide* transaction, on the contrary I am advised to reject the claim. The claim under certificate of deposit No. 6800 for \$7,500 is also rejected.

Respectfully yours,

6

(Sgd.) FREDERICK N. PAULY,
Receiver."

936

And also:

"Defendant's Exhibit 2, being described as application of O'Brien to defendant for a bond:

316

10851

3

FORM 2-Ed. 11-16-3 M

7

Application No.....	Agency.....
Bond No.....Form.....	Amount, \$....Rate, %....
[Vignette.]	I. R. No....Premium, \$....
Date.....18..	From.....To.....

APPLICATION FOR BOND
OF THE
AMERICAN SURETY COMPANY
OF NEW YORK, 160 BROADWAY.

CASH CAPITAL, \$1,000,000.

The business of the American Surety Company is devoted exclusively to Guaranteeing the Fidelity of persons holding positions of Pecuniary Trust, and of acting as Surety on Bonds and undertakings required in the Courts.

8

Please Answer all Questions in this Application.

937

The undersigned hereby makes application for a Bond of Indemnity, to date from July 1st, 1891, for Fifteen thousand 15,000.00 Dollars, (\$15,000.00) in favor of California National Bank, San Diego, California, as security to them covering the Applicant's position in their service as Cashier of Calif. Nat. Bank at San Diego, in the State of California, and hereby affirms that in the following declarations made and answers given, he states the truth without reservation of any kind whatsoever.

1. Is the above named location a Post Office? If not give name of nearest Post Office.
Yes.

9

2. What is your full name?

George Norton O'Brien. Age 24 years.

3. Where and when were you born?

Kewanee, Henry County, Illinois, Oct. 19, 1867.

4. How long did you reside in your native place?

About fifteen years.

5. Are you married or single? If married, state how many children you have.

Unmarried.

938

10 If wife is alive, give her name and address, if a widower, please so state.

6. If others besides wife and children are dependent on you for support, give name and particulars.

Father, James O'Brien; sister, M. Carrie O'Brien.

7. How long have you been engaged with your present employer?

Three years and a couple months.

How long in position for which bond is now required?

Six months.

8. What is the nature of the business and where located?

739 11 Banking business at San Diego, California.

9. What are the duties required of you in this position?

Bank correspondence and supervision of the several departments.

10. What salary are you receiving?

\$1,800.00 per annum or thereabouts.

11. If any other allowances will be made you?

None.

If salary is subject to any deduction, state particulars.

None.

12 Have you any income from sources other than that of the salary above named? If so how much (about) and from what source is it derived?

None worth mentioning.

13. Are you engaged in any other business which you will carry on during this employment? If so, describe its nature, and if a partnership give name of partner.

None.

14. Are you engaged in, or do you from time to time engage in, purely speculative transactions, such as stocks, grain, oil, or real estate? If so give particulars.

No.

15. Have you ever been bankrupt or insolvent, or did you ever compound with your creditors? If so, state whether now discharged, and in what manner.

No.

16. Have you ever been in arrears or default in your present or any previous employment? If so, please give full particulars.

No.

17. When and by whom were your accounts last examined and were they found correct?

National Bank Examiner. Yes.

18. Have you ever been discharged from any situation? If so, state particulars.

No.

19. Give particulars and amount of any debt you owe or liability you are under; also state whether you are endorser or surety for any one, and to what extent?

Am on few small bonds and am security on one or two notes of no consequence. I owe about 2,000.00 on my home.

20. Have you hitherto given security? If so, please give names and addresses of your bondsmen, and state why discontinued.

No, and am not now required to do so.

21. Do you now furnish security in addition to that herein applied for? If so, how, and to what extent?

No.

22. Have you ever applied to any other source for a bond? If so, state when and to whom, and, whether successful.

No.

23. What was your occupation immediately preceding your present position, and for what reason did you leave the same?

Real estate business. Discontinued to better my condition.

24. Please fill in the following blanks, giving dates of your employment and names of employers during the past ten years.

921

922

16

FROM What Date.	TO What Date.	EMPLOYED AS	AT Address.	IN SERVICE OF Name of Employer or Corporation.	UNDER Name of Manager, Super- tendent or Head of Depar- tment—for reference.
1884	1885	Book-keeper.	Tiffin, Ohio.	O'Brien Bros. Mfg. Co.	James O'Brien, Pres.
1885	1887	Book-keeper and Shorthand.	do	B. & O. Ry. Co.	E. M. Davis, D. F. A.
1887	1888	do	San Diego, Cal.	W. H. Holabird & Co.	W. H. Holabird.
Left School	—Graduate	University of Notre Dame, Ind., in Summer of 1884.	In active business only		7 years.

943

25. Give reasons in full for leaving former employers.

My wish to go West.

26. If your life is insured, state for what amount, for how long a time, and in what Company.

5,000 Equitable 20 years from '88; Mich. Mutual Detroit, 2,500 40 ys. '87; 5,000 U. S. Mutual Accident 1 yr; 1,000 C. K. A. Chattanooga Life.

27. Please give particulars respecting parents and nearest relatives, if living, as follows:

Name of Father, James O'Brien. Address, San Diego, Calif. Business, Retired, old age.

Name of Mother. Not living.

Name of nearest male relative on Father's side, Thos. O'Brien. Address, Morico, Ills.

Name of nearest male relative on Mother's side, Myles Seery. Address, Princeville, Ills.

944

28. The applicant is requested to give below the names and addresses of as many persons as possible for Referees, *not less than five*, who are not related to him. In no case, however, must a Referee be named who is one of the firm or an officer of the Bank or Company in whose favor the bond herein applied for is to be made.

	NAME.	OCCUPATION.	POST OFFICE ADDRESS. No. of Street, if in a City.
1	Elias Lyman.....	Banker.	Kewanee, Ills.
2	Thos. H. Noonan.....	G. M. Big 4 R. R.	Chicago, Ills., 12 Pacific Ave.
3	Jno. Ellis.....	Banker.	Kewanee, Ills.
4	E. M. Davis.....	D. F. A. B. and O.	Tiffin, Ohio.
5	L. W. Frary.....	Retired.	Pasadena, Calif.
6	.....	.....	.....
7	.....	.....	.....
8	.....	.....	.....

NOTE. If the required information is not given in response to the foregoing questions it will be necessary to return this blank to you for completion. The answers will be treated as strictly confidential.

17

18

IN CONSIDERATION of the American Surety 19
 Company agreeing or consenting to issue on my
 behalf, a certain bond or obligation upon the state-
 ments contained in this application, guaranteeing
 the employer, herein named, against any loss or dam-
 ages, arising out of any act of default, miscarriage or
 neglect of mine, I DO HEREBY COVENANT,
 PROMISE AND AGREE and bind myself, my
 heirs, executors, administrators, and assigns to in-
 demnify and at all times keep amply indemnified
 and save harmless, the said Surety Company of,
 from and against any and all loss, costs, damages,
 charges and expense whatsoever which the said
 Company shall or may for any cause, at any time,
 sustain, or incur, by reason or in consequence of 20
 said Company having entered into and executed
 said Bond or obligation.

AND I DO ALSO expressly agree to indemnify
 and save harmless the said Surety Company from
 all loss or damage, by reason of its having entered
 into and executed any other bond or obligation on
 my behalf, required by me, to be given in the ser-
 vice of the said employer, or assigns, whether in-
 duced by representations disclosed in this applica-
 tion, or in any subsequent application submitted
 for such guarantee, or upon any statements or rep-
 resentations made by me, or by any person duly
 authorized and acting in my behalf, hereby intend-
 ing to become responsible to said Company for any 21
 loss by it sustained by reason of having entered into
 any obligation, bond or guarantee issued for me or
 on my account.

IN WITNESS WHEREOF I have hereunto set
 my hand and affixed my seal this 10th day of July,
 1891.

GEORGE N. O'BRIEN. [SEAL.]

Signed, sealed and delivered)
 in the presence of—)

J. ED. KELLEY.

Post-office address in full, San Diego, Calif.

- 22 If this application is declined the Company reserves the right to withhold the reason therefor, if deemed necessary, as all information relative thereto is regarded as confidential.

CERTIFICATE OF EMPLOYER.—Over.

EMPLOYER'S CERTIFICATE.

I have read the foregoing declarations and answers made by George N. O'Brien, and believe them to be true.

945 He has been in the employ of this Bank during three (3) years; and to the best of my knowledge has always performed his duties in a faithful and satisfactory manner.

- 23 His accounts were last examined on the 28th day of March, 1891, and found correct in every respect. He is not to my knowledge, at present, in arrears or in default.

I know nothing of his habits or antecedents affecting his title to general confidence, or why the bond he applies for should not be granted to him.

Amount required, \$15,000.00. Bond to date from July 1, 1891.

Dated at San Diego, the 10th day of July, 1891.

(Signature.) J. W. COLLINS,

Pt. Cal. Nat. Bk.

On behalf of

- 949 24 NOTE.—If applicant is newly employed, write here "New Employee," and give name and address of person by whom he was introduced to you.....

FOR THE EXCLUSIVE USE OF THE HOME OFFICE.

References Mailed.....	References Duplicated.....
Additional References Requested.....	Received and Mailed.....
E. G. S. Mailed to Employer.....	Returned Completed.....
Wrote.....	Agency in re.....
Wrote Employer	
Wrote Applicant	
.....	
.....	
.....	

It is further ordered, that nothing herein contained shall operate to postpone or delay the hearing of the appeal herein.

E. HENRY LACOMBE,
Circuit Judge.

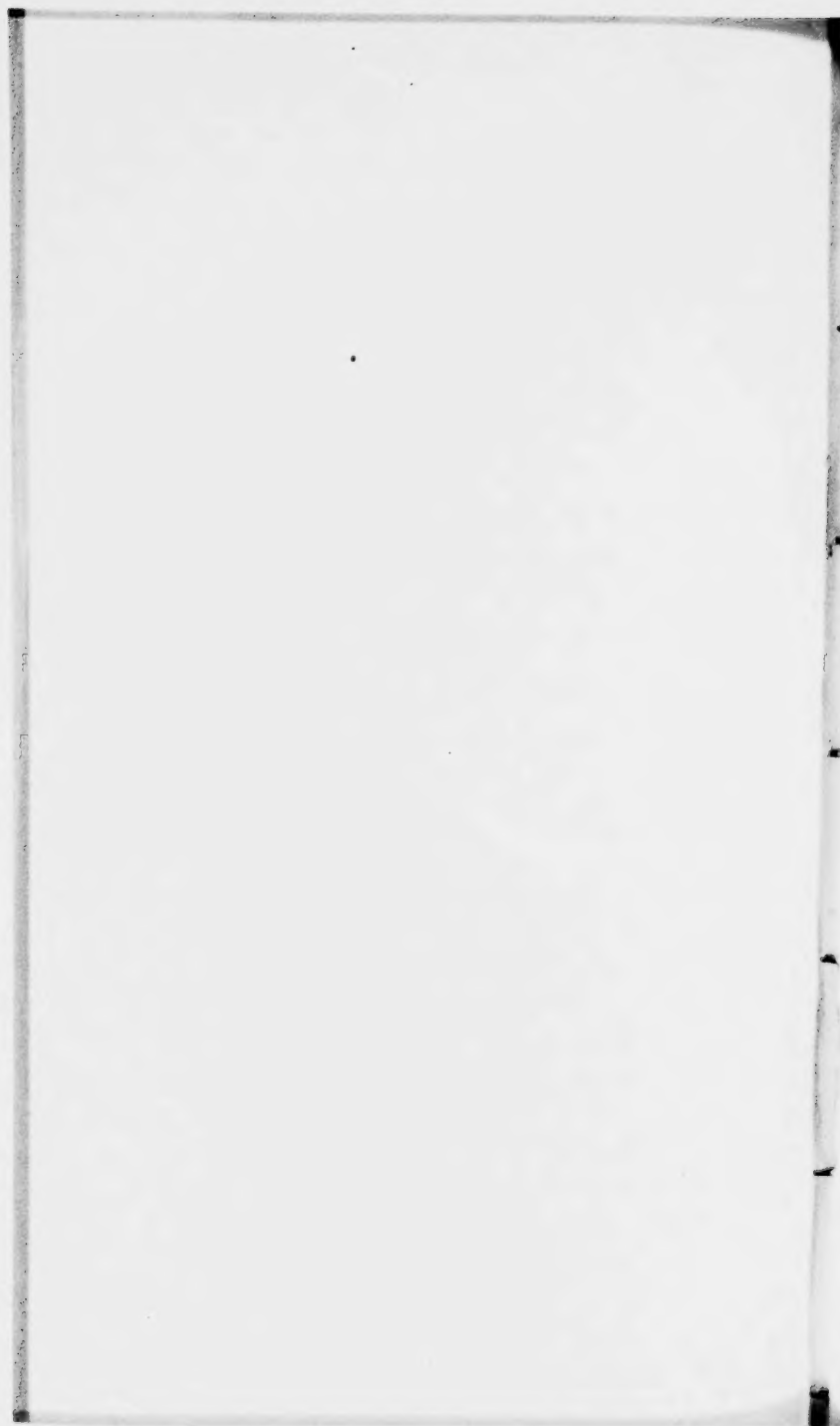
We hereby consent to the entry of the foregoing order.

MITCHELL & MITCHELL,
Attorneys for Plaintiff.
HENRY C. WILLCOX,
Attorney for Defendant.

(Endorsed)—United States Circuit Court, Southern District of New York.—Frederick N. Pauly, as Receiver of the California National Bank of San Diego, California, Plaintiff, against American Surety Company of New York, Defendant. —Action No. 1 (O'Brien, Cashier).—Consent and order to amend Bill of Exceptions.—Henry C. Willcox, Attorney for Defendant, No. 160 Broadway, New York City, N. Y.—U. S. Circuit Court.—Filed Sep. 30, 1895.—John A. Shields, Clerk.

950

26



323 United States Circuit Court of Appeals, Second Circuit.

AMERICAN SURETY COMPANY, Plaintiff in Error,

vs.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, Defendant in Error.

Action No. 1.
Cashier's Case.

This is a writ of error to review a judgment for \$17,435.39, rendered against The American Surety Company, defendant below, in the circuit court, southern district of New York. The plaintiff below sued as receiver of the California National Bank of San Diego to recover the amount of \$15,000, to which extent the surety company had contracted to make good any loss resulting from the fraud or dishonesty of one George N. O'Brien, the cashier of said bank.

The judgment was entered upon the verdict of a jury.

LACOMBE, Circuit Judge:

One J. W. Collins, who had been cashier from the organization of the bank, in 1888, became its president in 1891. Thereupon George N. O'Brien was promoted and made cashier, and made application to the defendant for a bond of indemnity, to date from July 1, 1891, for \$15,000, in favor of the bank, as security covering his position in the bank's service. The defendant is a New York corporation, engaged in the business, among other things, of issuing surety or guarantee bonds for persons in positions of public or private trust, and

324 paid it executed and delivered the bond in suit, which is correctly described by the trial judge as "in legal effect an insurance policy, by which the defendant undertook to guarantee the bank against loss arising from the fraud or dishonesty of O'Brien."

The material parts of such bond are as follows:

"This bond made July 1, 1891 between the American Surety Company of New York * * * of the first part, and George N. O'Brien * * * hereinafter called the 'employee' of the second part, and California National bank, hereinafter called the 'employer' of the third part.

Whereas the employee has been appointed in the service of the employer, and has been assigned to the office or position of cashier by the employer and has applied to the American Surety Company of New York for the grant by it of this bond,

Now therefore, in consideration of the sum of \$75. * * * as a premium for the term of twelve months ending on the first day of July, 1892 at 12 o'clock noon, it is hereby declared and agreed, that subject to the conditions herein contained, the company shall, within three months next after notice, accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer of moneys, securities, or other

personal property in the possession of the employer, or for the possession of which he is responsible, by any act of fraud or dishonesty, on the part of the employee in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within 325 six months from the death or dismissal or retirement of the employee from the service of the employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, shall be *prima facie* evidence thereof. Provided always that the company shall not be liable by virtue of this bond, for any mere error of judgment, or injudicious exercise of discretion on the part of the employee, in and about all or any matters, wherein he shall have been vested with discretion, either by instruction, or rules and regulations of the employer. And it is expressly understood and agreed that the company shall in no way be held liable hereunder to make good any loss which may accrue to the employer by reason of any act or thing done, or left undone, by the employee, in obedience to, or in pursuance of any direction, instruction, or authorization conveyed to or received by him from the employer or its duly authorized officer in that behalf. * * * The following provisions also are to be observed and binding as a part of this bond.

That the company shall be notified in writing at its office in the city of New York of any act on the part of the employee, which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer. That any claim made in respect of this bond shall be in writing, addressed to the company, as aforesaid, as soon as practicable after the discovery of any loss for which the company is responsible hereunder, and within six months after the expiration or cancellation of this bond, as aforesaid. And upon the making of such claim, this bond shall wholly cease and determine as regards any liability for any act or 326 omission of the employee committed subsequent to the making of such claim, and shall be surrendered to the company on payment of such claim.

That the company shall not in anywise be responsible under this bond to a greater extent than \$15,000. * * * That no suit or proceeding at law or in equity shall be brought to recover any sum hereby insured, unless the same is commenced within one year from the making of any claim on the company."

The bank suspended payment and its assets were taken possession of by the bank examiner November 13, 1891. The plaintiff was appointed receiver and duly qualified as such on December 29, 1891. Having discovered, as he believed, acts of fraud and dishonesty on the part of O'Brien, resulting in loss to the bank, the receiver, after giving written notice and sending to the company written proof of loss, the receipt of both of which was acknowledged,

began this suit. By the complaint and the bill of particulars recovery is sought for various items, but at the close of the trial the court left it to the jury to determine as to certain transactions of October 13th and 14th, 1891, only.

The facts relating to these transactions are, briefly, as follows:

On October 12, 1891, Collins, the president, was in New York, and effected a loan from the Western National bank of that city to the California bank. This loan was made on a note of the California bank for \$20,000 and on the security of promissory notes, the property of the California bank, amounting to \$36,250. The proceeds of the loan were credited by the Western National bank to the California bank and subsequently drawn out by it. The loan was to the bank and not to Collins. A truthful record of
 327 this transaction upon the books of the California bank would have been a credit of the amount to "bills payable," and a debit of the same to "Western National bank." The actual entries on the books are a debit to the "Western National" and a credit to "J. W. Collins" in his individual account, and no credit to bills payable. The result of such entries is that the proceeds of the loan obtained on the credit of the California bank and by pledge of its collaterals, and which should have remained subject only to its disposal, were left subject to the order of Collins by his personal cheque. These entries were thus made in entire good faith, so far as appears, by the book-keepers in consequence of the act of O'Brien. On October 13, 1891, he filled up in his own handwriting a deposit tag, which represented that by telegraphic despatch Collins had that day made a deposit in the California bank of "\$20,000 Western National."

On the same day a precisely similar transaction took place between Collins and the U. S. National bank, whereby commercial paper the property of the California bank was rediscounted and the transaction falsely recorded on the books of said bank, by reason of a similar false deposit tag prepared by O'Brien himself. The amount credited to Collins on this tag was \$24,500.

It thus appeared that as a result of O'Brien's acts in filling up these two deposit tags with statements which were false in fact, Collins' account with the bank was inflated in the amount of \$44,500. It further appeared that when the bank suspended payment on November 12, 1891, there was standing to his credit \$11,420.90 only—that is to say, the aggregate amount drawn out by Collins exceeded whatever balance he had standing to his credit on October 12, 1891,
 328 plus all subsequent deposits (except the two above described) by \$33,079.10. The bank therefore lost that sum by reason of these false credits, for had it not been for the false credits Collins' account would have been exhausted and, presumably, his cheques not honored, before any of this \$33,079.10 was drawn out.

That these two deposit tags were written by O'Brien is not disputed. They are in his handwriting. He was called as a witness by plaintiff, but declined to testify on the ground that his answer might tend to incriminate him, since he was indicted by the grand jury upon certain charges growing out of his connection with the

affairs and management of the bank. That the entries upon the tags were false is abundantly established on the proof. They called for entries to the credit of Collins on his individual account of the amounts obtained from the U. S. bank and the Western National bank, and the officers of those banks testified that their transactions of October 12th with Collins were loans not to him, but to the California bank. The mere fact, however, that the entries on the tags were false did not by itself prove "fraud or dishonesty" on the part of O'Brien. *Non constat* that he acted ignorantly or negligently. There was, however, evidence that, although Collins' account showed that he had at all times a balance to his credit, he was in fact largely indebted to the bank by reason of other similar false entries; that on other occasions O'Brien himself had made similar entries. O'Brien's age, experience, and connection with the bank *was* shown, it appearing that he had been in control of the bank (during the absence of Collins) for several weeks at the time this transaction took place. Letters of his were introduced tending to show knowledge of irregularities, and it was open to the jury upon the proof to infer that O'Brien knew when he made the entries on the tags that they falsely represented the transactions. The

329 court left it to the jury to determine whether O'Brien's action in making these entries, manifestly false, was or was not dishonest or fraudulent. The jury were charged that "if the conduct of the cashier in that transaction was a mere error of judgment, was an honest irregularity, plaintiff could not recover; but if he, knowing Collins was not entitled to be credited with these two items, believing that he was not entitled to be credited with them, nevertheless put those items to his credit, that was a dishonest act, and it was a fraudulent act within the meaning of the bond." The court further charged that "fraud is not to be lightly presumed. Every man is supposed to be honest until the contrary is shown," and after reviewing the evidence instructed the jury that "the burden is upon the plaintiff to satisfy you by a fair preponderance of proof that these credits were given to Collins by the fraud or dishonesty of the cashier." To this part of the charge there was no exception, plaintiff in error replying upon its exceptions to a denial of its motion to direct a verdict. Inasmuch as the entries were conclusively shown to be false, and there was evidence tending to show that O'Brien must have known them to be false, it would have been error to take this question from the jury, and their finding upon the evidence under proper instructions is conclusive.

Various assignments of error remain to be considered.

I. It is contended that the receivers failed to give the notice required by the bond, which provides that "the company shall be notified in writing * * * of any act on the part of the employee which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer."

330 This notice was given May 23, 1892. The evidence as to when knowledge of O'Brien's improper act was obtained was conflicting. So manifestly is there a conflict on this point that

it would be a waste of time to review the evidence in detail: a perusal of the testimony of the receiver reveals it. The proposition contended for that he is to be concluded by the dates given in his original bill of particulars, subsequently amended, or by his statements when first examined on deposition is without merit. He manifestly testified solely from his recollection, and it is not surprising that there is a variance between the date stated by him at first and the one subsequently given, after his attention had for months been directed to the subject. Conflicts of evidence as to questions of fact are to be determined by the jury, whether they arise upon the testimony of one witness or of two, and in this case there was other evidence tending strongly to support the conclusion which the jury evidently reached, that O'Brien's acts were discovered shortly before May 23rd, 1892, when the notice was sent. In fact it is difficult to see how they could have reached any other conclusion. However much the receiver varied in his statements as to the date when he first learned of the falsity of O'Brien's entries he was consistently positive that he acquired his knowledge through the report of an expert, who, it is conclusively shown, was not employed until April, and who apparently did not himself discover O'Brien's improper acts until May. As there was a conflict of evidence on this point, the court properly left it to the jury to determine, under instructions, as to what would and what would not be reasonable promptness in giving the notice. Careful and exhaustive instructions were given on this branch of the case: they

331 were not excepted to save as noted in the next subdivision. The jury were charged that after acquiring knowledge of the improper act it was the receiver's duty, not as soon as possible to transmit information of it to the defendant, but to do it with reasonable promptness. He was not bound the first day or the next necessarily to give notice, but he was to give notice within a reasonable time; and it is for you to say, upon a consideration of all the circumstances of the case, whether he did, within a reasonable time after acquiring such knowledge, send the letter of May 23rd. It might be reasonable under one state of facts, it might be unreasonable under another. What might be very great diligence under one set of circumstances might be very dilatory under another. * * * If * * * discovery was made early in February and notice was not given until July, that was not notice with reasonable promptness. * * * If the fact was discovered early in February and notice was not given until the latter part of May, that was not notice given with reasonable promptness. But if you come to the conclusion that the discovery was not made till the middle or latter part of May, then, in view of the situation of the plaintiff, you may reasonably come to the conclusion that he exercised proper diligence in sending the notice. * * * The burden of proof is with the plaintiff, and you must be satisfied by a fair preponderance of proof that he has fulfilled the terms of the condition (as to giving notice within a reasonable time). To no portion of the charge as above quoted was there any exception taken. Plaintiff in error apparently contends that the question as to

reasonableness of time should not have been left to the jury. The action of the trial judge in thus submitting it to them is sustained by authority. *O'Brien vs. Phoenix Ins. Co.*, 76 N. Y., 459; and see *Am. and Eng. Encyclopedia of Law*, vol. 19, p. 642, where the results of many decisions

332 are thus summarized: "If the question as to what is a reasonable time is not resolved expressly or impliedly by the rule of law or by the writing which is under consideration, so that the judge in deciding the question would have no legal ground, but merely his individual ideas, to go upon, and especially if, in addition, the question depends in the individual case upon peculiar, numerous, or complicated circumstances, the reasonableness of the time becomes a question for the jury, whose province it is, rather than that of the judge, to say, in view of all the facts of the case, whether or not the time in question is reasonable in the sense of being in accordance with the course of business and the ordinary transactions of life."

There was no error, therefore, upon the conflict of evidence in this case in leaving the question of reasonableness of time in giving notice to the jury.

After the charge one of the jurors asked whether "if they found out the fraud on the second day of March and notified the company on the 23rd of May would that be in law a notice as soon as practicable." To this the court replied, "No; I should charge, in regard to that, that that is a question for you to determine. It is a question of fact and not a question of law." To this defendant excepted, but under the authorities above cited the charge was sound.

II. Plaintiff in error duly excepted to a statement in the charge that "it is not sufficient to defeat the plaintiff's action upon the policy that it be shown that the plaintiff may have had suspicions of dishonest conduct of the cashier." The court charged in the same connection that "defendant was entitled to notice in writing of any such act of the cashier which came to the knowledge 333 of the plaintiff, of a fraudulent or dishonest character, as soon as practicable after the plaintiff acquired knowledge. * * *

It was plaintiff's duty under the policy, when it came to his knowledge—when he was satisfied that the cashier had committed acts of dishonesty or fraud likely to involve loss to the defendant under the bond—as soon as was practicable thereafter, to give written notice to the defendant * * * and in considering this you are to inquire, first, when it was that the plaintiff became satisfied that the cashier had committed dishonest or fraudulent acts which might render the defendant liable under this policy. He may have had suspicions of irregularity, he may have had suspicions of fraud, but he was not bound to act until he had acquired knowledge of some specific fraudulent or dishonest act which might involve the defendant in liability for misconduct."

The exception is unsound. The charge carefully conforms to the requirements of the bond. "Knowledge" and "suspicions" are not synonymous terms. The bond calls for no notice of suspicions, but only for *any act* on the part of the employee which may involve

loss, as soon as practicable after the occurrence of *such act shall come to the knowledge of the employer.*

III. It is further contended that the claim or proof of loss which was mailed to the company June 24th, 1892, was not served as soon as practicable after discovery. It is — necessary to discuss this point; it involves reasonableness of time and was properly left to the jury.

IV. It is next contended that if the date of discovery be taken as May 23rd, 1892, there can be — recovery under the bond, which provides that the company shall be liable for acts of fraud or
334 dishonesty involving loss occurring during the continuance of this bond "and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employee from the service of the employer." It is insisted that because O'Brien ceased to act as cashier when the bank closed its doors, on November 12th, 1891, discovery more than six months after that date is fatal to plaintiff's case.

There is no merit in this contention. O'Brien ceased to act as cashier on November 12th, 1892, because the bank ceased on that date to do a banking business and therefore went into liquidation. The bond contemplates service other than as cashier. It insures fidelity on the part of the employee "in connection with the duties of the office or position hereinafter referred to *or the duties to which in the employer's service he may be subsequently appointed.*" O'Brien was continued in service by the receiver until early in March, 1892, when he voluntarily resigned. He was not dismissed, nor did he retire from the service of his employer, the California National bank, on November 12th, 1891. That bank did not cease to exist when the bank examiner took charge of its affairs, on November 12th, nor when the receiver qualified and took possession, on December 29th, and the services rendered after that date were rendered to the bank none the less because its business affairs were directed and controlled by a receiver instead of by a board of directors.

V. It is further contended that there should be no recovery for these items of October 13th because the proof of loss "did not pretend to show any loss on this item. It merely stated that false credits to this amount were given, but did not state that Collins ever drew out the money."

335 The proof of loss sets out several other instances of false entries. As to the item referred to, it states:

"That on the 13th and 14th days of October, 1891, said G. N. O'Brien, being the cashier of said bank, and as such cashier having charge and supervision of the books of said bank, made entries of the deposit tags and caused the same to be entered by a book-keeper in the books of the bank of credits in favor of J. W. Collins, of the sum of \$45,000, without the said Collins paying any consideration therefor to said bank, and without being entitled to said credits, as he, the said O'Brien, then and there well knew." After reference to other false entries, there follows: "Affiant further says that *neither of the above sums nor any part thereof* have ever been returned to said bank."

The objection is hypercritical. The claim imports with reasonable plainness that the sum of \$45,000, falsely entered to the credit of Collins, was taken from the bank, for it is expressly stated that it has never been returned or repaid. It is difficult to conceive of a business man of such phenomenal mental obtuseness as to be misled by such a notice into the belief that the assured made no claim to have lost anything by the false entries of October 13th and 14th of a clause providing for proofs of loss much more specifically than does the bond in suit. It was said in *Turley vs. North Am. Fire Ins. Co.*, 25 Wond., 375: "This clause of the contract is to receive a reasonable interpretation; its intent and substance as derived from the language used should be regarded. There is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it for the purpose of guarding against fraud or imposition. Beyond this, we would be sacrificing substance to form—following

336 words rather than ideas." The requirement in the contract in suit calls only for "a written statement of such loss, certified by the duly authorized officer or representative of the employer and based upon the accounts of the employer." The statement of loss in evidence is in substantial compliance with this requirement.

VI. The plaintiff in error contends that it was error to admit in evidence Collins' ledger account and the teller's book. The teller's book was kept by Gregg, the teller, who died before the trial, but contains entries by others. The only pages from this book which were put in evidence refer to September 22nd, on which day it was contended that no money was paid into the bank for certificates of deposit, although on that day certificates were issued to Collins; and to May 2nd, on which day it was contended that certificates were issued to Collins in excess of any money paid in for certificates. It was competent in evidence, but not conclusive evidence that money was not paid in to show that upon the page where such payments should have been entered they did not appear, the course of business having been shown and the summaries of transactions of each day into which all items entered and by which the daily balance was struck being shown to be in the handwriting of the deceased teller.

The ledger account of Collins was kept by Brimhall, the book-keeper. All the entries on both debit and credit sides were made by him, except two made after the bank suspended, and with which we have no concern, since, as heretofore stated, Collins' ledger balance on that day was only \$11,420.00. Brimhall was called to the stand and testified as to the accuracy of all his entries. Those on the credit side were made from deposit tags; these tags were all put in evidence, and since the plaintiff in error has not
337 painted them nor called attention to any of them in argument, it must be presumed that examination of them showed that Brimhall's entries in the ledger agreed with them. Gregg, who acted both as paying and as receiving teller, died before the trial. In the regular course of business he was the one who first received the deposit tags, and after examining them and verifying

the deposits accompanying them placed the tags upon a spindle, whence they passed to the book-keeper. If Gregg were alive he should have been called to testify that he allowed no tag to pass beyond him without verifying it, and that if he found it not to conform to the amount of money or cheques which it claimed credit for, he corrected it; but being dead, his evidence was not obtainable, and it is a well settled rule of evidence that in such cases it will be presumed, in the absence of any evidence to the contrary, that the clerk properly discharged the duties of his office. The spindle puncture in the tags indicated to the book-keeper that they had passed the teller, and under the application of the rule it must be held that the teller had found them correct, either by finding with them the money or cheques they called for or by seeing upon them, as was the case with the deposit tags of the \$44,500 in controversy, the declaration of the cashier that telegraphic despatches entitled Collins to a credit.

All the entries on the debit side of Collins' ledger account down to the day when the bank suspended were made by Brimhall, the book-keeper. He testified that he made them all from cheques of Collins, which, of course, were subsequently returned to Collins. These cheques, when before Brimhall, all showed the teller's stamp, showing that they had been paid by the bank. The book-keeper

338 had no personal knowledge whether they were paid or not, but the teller had, and the stamp affixed by the latter in the regular course of his business, he being dead, is as competent evidence of their payment as would be his own statement to that effect if he were living and in the witness chair.

The authorities cited by the plaintiff in error deal with a very different state of affairs. In all of them the books were offered merely as "books of account" without independent proof of the accuracy of their contents. In the case at bar all the entries admitted from the ledger were proved by the evidence of the individual who made them from the original memoranda, supplemented by proof that such original memoranda were found to be correct or were correctly made by the very individual who received the deposits and who paid out the money on the cheques. The objection to the admission of the ledger account of Collins on the ground that it was incompetent and not sufficiently proved is therefore unsound; and, in view of the fact that such account shows that Collins drew out of the bank money amounting in the aggregate to more than stood to his credit on October 12th plus all deposits subsequent to October 13th, the excess, \$33,979.10, coming out of the credits for \$44,500 given him October 13th on the false entries of O'Brien, the objection that such account was irrelevant and immaterial is simply frivolous.

VII. It is further contended that the court *heard* in admitting evidence of similar acts of fraud and dishonesty perpetrated by O'Brien prior to the date of the bond. No claim was made against the surety company for any loss sustained by such fraud, but evidence as to them was relevant and material as tending to show that the transaction of October 13th was not a mere oversight or

negligence of O'Brien, but was an intentional and dishonest
 339 act, one of many such and part of a systematic scheme to
 divert the funds of the bank into Collins' hands. *Continental Ins. Co. vs. Ins. Co. of Penn.*, 2 C. C. A., 538.

And, on the same principle, it was relevant and material to show that on October 13th Collins, who had an apparent balance to his credit of over \$100,000, was in reality, partly by reason of other false entries and other improper actions of the cashier, a debtor to the bank in a large amount.

VIII. It was not error to admit the paper Exhibit J 1, which was a statement of the account of Collins, as corrected by the expert accountant, showing that the bank claimed that when it suspended he owed it \$371,978.22. This document, which was enclosed in a letter from the receiver to the company, dated July 18th, 1892, was sent in answer to a request made by the company, in a letter of July 8th, that it be furnished with statements, on its regular printed forms, of the claims against Collins and O'Brien, and also with "*full information in regard to the shortages and credits, of every kind whatever, whether on account of salary, money paid, or assignments made by either of said persons to the California National bank.*" It was clearly admissible as part of the correspondence, and the only objection made to its admission was on the ground that it was not the original, but a copy. The original was not produced by the defendant to whom it had been sent, and the accuracy of the copy was sufficiently proved. The question of its weight as evidence, which plaintiff in error has argued here, is a very different one from that of its admissibility; but no such question is presented on this record. Plaintiff in error might have reserved the point by a request to instruct the jury as to what consideration they might probably give to the document, but he made no such request and has no exception which presents the point.

IX. It is further contended that the court erred in refusing
 340 to direct a verdict for the defendant on the ground that the bond had been procured by misrepresentation and concealment on the part of the bank. Plaintiff in error also excepted to so much of the charge as instructed the jury that there was nothing to that defense.

There was evidence that prior to the execution of the bond O'Brien had by acts of fraud and dishonesty assisted Collins in obtaining false credits, and thus getting possession of money which rightfully belonged to the bank. At the time when O'Brien made application for the bond in suit Collins also made application for a similar bond insuring his (Collins') honesty and fidelity and obtained one for \$25,000. How it came about that these two bonds were asked for, whether it was a suggestion of Collins or whether any by-law or resolution of the board of directors required security to be given, does not appear. The bond in suit recites that the "employee" (O'Brien) "has applied to the American Surety Co. for the grant by it of this bond," and defendant put in evidence the application on which it was granted. It is to be assumed, as the trial judge held, that the officers of the defendant relied upon the representations

contained in the application. This application, which is filled up on a printed form furnished by the company, contains various statements of O'Brien personally, mainly in answer to questions. On one of its pages there also appears what is described as an "employer's certificate." No such certificate was required as a preliminary to the granting of the bond for insuring Collins' fidelity, and there is nothing to show that the bank or any of its officers, except Collins, had any information that a certificate by any one as to the good character of O'Brien was asked for by the surety com-

341 pany as a prerequisite to the issue of its policy of insurance, which does not on its face incorporate the application as a condition of the contract nor in any way refer to the same.

The so-called "employer's certificate" reads as follows:

"I have read the foregoing declarations and answers made by George N. O'Brien and believe them to be true.

"He has been in the employ of this bank during three (3) years, and to the best of my knowledge has always performed his duties in a faithful and satisfactory manner.

"His accounts were last examined on the 28th day of March, 1891, and found correct in every respect. He is not, to my knowledge, at present in arrears or in default.

"I know nothing of his habits or antecedents affecting his title to general confidence or why the bond he applies for should not be granted to him.

"Amount required, \$15,000, bonds to date from July 1st, 1891.

"Dated at San Diego, the 10th day of July, 1891.

(Signature)

J. W. COLLINS,

Pt. Cal. Nat. Bk., on Behalf of — — —"

It is contended that the knowledge which Collins had as to O'Brien's dishonesty was the knowledge of the bank, and that his act in signing this certificate constituted a concealment or misrepresentation for which the bank is to be held responsible.

Ordinarily, in transactions to which a corporation is a party the knowledge of its president is imputed to the corporation, upon the theory that it is his duty to communicate such knowledge to the corporation, and that it must be presumed that such duty has been performed, and representations made by an agent in the course of transactions conducted on behalf of a principal and for its 342 benefit are held to be the representations of the principal.

There are, however, well-recognized qualifications of these propositions. In the distilled spirits, 11 Wall., 367, it was held that the presumption that an agent communicates his knowledge to his principal will not be entertained when it is not the agent's duty to communicate such knowledge, nor when it would be unlawful for him to do so. In *Commercial Bank vs. Cunningham*, 24 Pick., 276, it was held that the knowledge of a director is no proof of notice to a bank when he is himself a party to the contract having an interest therein opposed to that of the corporation. See also *Davis Imp. W. L. Co. vs. Davis W. L. Co.*, 20 Fed. Rep., 701, and cases there cited. That the liability of an innocent principal for the frauds

and deceit of his agent causing damage to a third party is restricted to cases where the agent was acting within the scope of his authority has been repeatedly held. So where a station agent authorized to issue bills of lading for freight received by a railroad company fraudulently combined with another person to issue bills of lading to him, no freight having been received, one who in good faith had advanced money on the faith of such bills was held not entitled to recover against the railroad company. *Friedlander vs. Texas, &c., Railway Co.*, 130 U. S., 416.

It is unnecessary to multiply references, for in none of the cases cited on the brief of either side nor in such as have come to the knowledge of this court in its investigation of the case at bar are the facts sufficiently analogous to make the citation especially persuasive. I may be well to restate them, thus limiting the application of this decision. The president of a national bank concocts a scheme to purloin its funds, and finding it necessary, in order to accomplish his purpose, to secure the assistant of the cashier, induces him to enter into the plot. The abstraction
343 of the bank's funds is accomplished by means of false entries on the books, which deceive the bank examiner, by means of the issue of false certificates of deposit and by the payment of cheques of the main conspirator which are not thereafter charged against him. After these fraudulent practices have gone on for some time it becomes necessary to file with the bank security for the fidelity of both parties to the scheme. The bank does not select the surety. The two employees, so far as appears, are free to choose whom they please, provided only that the surety be of sufficient ability to respond. Under these circumstances both the dishonest employees individually apply to the same person to become their surety, such person being a company which in some instances requires a certificate of the good character of the employee to be given by the employer before it will consent to underwrite the honesty of such employee. In some instances it does not require such a certificate. In *Collins' case* it became his bondsman with no certificate from any one but himself personally. The giving of the certificates of good character of its employees is no part of the ordinary business of a bank. There is nothing to show that the president was ever authorized by the bank or the board of directors to act for the bank in making such a certificate, nor that the bank, either when the surety was applied to or when the bond executed by it was delivered to the bank, was informed that any such certificate was required. The authorities are not favorable to the assumption of any species of executive power by a bank president without direct authorization. *Morse on Banks*, 2nd ed., p. 143. But there are many acts which the president of a bank may do without express authority of the board of directors, in some cases because
344 usage of the particular bank impliedly authorizes them, in other cases because such acts are fairly within the ordinary routine of his business as president. The making of statement, however, as to the honesty and fidelity of an employee for the benefit of the employee and to enable the latter to obtain a bond insuring

his fidelity on the strength of such representations is no part of the ordinary routine business of a bank president, and there is nothing to show that by any usage of this particular bank such function was committed to its president.

We have reached the conclusion, therefore, that plaintiff's right of action on the bond was not lost because its president, Collins, made to the defendants false representations as to the cashier's honesty. When two officers of a corporation have entered into a scheme to purloin the money of the corporation for the benefit of one of them, in pursuance of which scheme it becomes necessary to make false representations to a third person ostensibly for the bank, but in reality to consummate such scheme and for the benefit of the conspirators, and not in the line of ordinary routine business of such officers and without express authority, the corporation being ignorant of the fraud, the officers are not in thus consummating such theft the agents of the corporation.

X. It is next assigned as error that the court did not charge the jury, as requested by defendant, that "if O'Brien did what the plaintiffs claim, it was a crime." The pleadings raise no such issue, nor was it a question at all necessary for the jury to pass upon. Defendant had insured against "any act of fraud or dishonesty," and whether any act of fraud or dishonesty proved to have been committed by O'Brien was *was* also a criminal act was wholly immaterial. The verdict shows conclusively that upon the evidence they were satisfied that O'Brien had committed acts of fraud and dishonesty.

345 It seems to be the theory of the plaintiff in error that if the jury had been informed that the acts which they found to have been committed were not only fraudulent and dishonest, but also criminal, they would have disagreed or brought in a verdict for the defendant, presumably from some sentimental aversion to exposing O'Brien to the obloquy of a verdict which should find that he had committed acts which, if proved against him in a criminal prosecution, might subject him to punishment. If this would have been the result of charging the jury as requested, the refusal was not only sound, but exhibited a wise forethought on the part of the trial judge. The case would have been decided, not upon the evidence, which, as the event proves, convinced the jury of O'Brien's fraud and dishonesty, but upon considerations outside of the evidence and not legitimately before the jury.

The record presents one hundred and twenty-one assignments of error. The brief of plaintiff in error presents its argument only upon twenty-seven of them. We have examined the others, and as to them it is sufficient to say that they are either disposed of by what has been already written or are not of sufficient importance to call for any more extended discussion in this opinion than they received in the brief.

The judgment of the circuit court is affirmed.

[Endorsed:] Action No. 1. O'Brien. Copy. Opinion.

346 At a stated term of the United States circuit court of appeals for the second circuit, held at the United States court-rooms, in the city of New York, on the second day of March, 1896.

Present: Hon. E. Henry Lacombe, Nathaniel Shipman, circuit judges.

THE AMERICAN SURETY COMPANY OF
New York, Plaintiff in Error,
against

FREDERICK N. PAULY, as Receiver of
the California National Bank of San
Diego, California, Defendant in Error.

Order of Affirmance and
for Mandate. Action
No. 1 Cashier's Case.

This action having come before this court on a writ of error sued out on the first day of April, 1895, to review the judgments of the circuit court of the United States for the southern district of New York herein, entered on the 31st day of December, 1894, and after argument by George A. Strong, Esq., of counsel for the plaintiff in error, and William Mitchell, Esq., of counsel for the defendant in error, and due deliberation having been had thereon—

Now, on motion of Edward Mitchell, Esq., attorney for defendant in error, it is—

347 Ordered, adjudged, and decreed that the judgment of the circuit court aforesaid be, and the same is hereby, in all things affirmed, and that the defendant in error recover, in addition to said judgment, the amount of his costs and disbursements, to be taxed.

And it is further ordered that a mandate issue to the circuit court of the United States for the southern district of New York, directing that court to proceed in accordance herewith.

Notice of settlement waived.

(S'g'd)

HENRY C. WILLCOX,

Attorney for Plaintiff in Error.

Attorneys for Defendant in Error.

[Endorsed:] Action No. 1. O'Brien. Copy. Order of affirmance, &c.

348 Know all men by these presents that we, American Surety Company of New York, as principal, and Henry H. Cook, of No. 1 East 78th street, New York city, as surety, are held and firmly bound unto Frederick N. Pauly, as receiver of the California National Bank of San Diego, California, in the full and just sum of thirty-five thousand dollars, to be paid to the said Frederick N. Pauly, as such receiver, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Scaled with our seals and dated this 8th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a United States circuit court of appeals for the second circuit, in a suit depending in said court between The American Surety Company of New York, plaintiff in error, and Frederick N. Pauly, as receiver of the California National Bank of San Diego, California, defendant in error (No. 1), a judgment was rendered against the said plaintiff in error, and the said plaintiff in error having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant in error, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said plaintiff in error shall prosecute said writ to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

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AMERICAN SURETY COMPANY OF
NEW YORK.

By W. L. TRENHOLM, *President*. [SEAL.]
H. H. COOK. [SEAL.]

Scaled and delivered in presence of—
J. W. MASON.

Approved:

R. W. PECKHAM.

Asso. Justice of the Supreme Court of the United States.

(Endorsed:) United States Supreme Court. American Surety Company of New York, plaintiff in error, against Frederick N. Pauly, as receiver of the California National Bank of San Diego, California, defendant in error. Action No. 1. Writ of error bond, \$35,000.00. Henry C. Willcox, attorney for plaintiff in error, 100 Broadway, New York city, N. Y.. Defendant in error approves of the within bond as to form and sufficiency thereof and the sufficiency of the surety thereupon. Dated New York, April 8th, 1896. Frederick N. Pauly, defendant in error, by Edward Winslow Paige, counsel. United States circuit court of appeals, second circuit. Filed Apr. 16, 1896. James C. Reed, clerk.

350

(No. 1.)

UNITED STATES OF AMERICA, ss:

To Frederick N. Pauly, as receiver of the California National Bank of San Diego, California, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein The American Surety Company of New York is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff

in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this thirteenth day of April, in the year of our Lord one thousand eight hundred and ninety-six.

R. W. PECKHAM,

Associate Justice of the Supreme Court of the United States.

351 Frederick N. Pauly, as receiver of the California National Bank of San Diego, California, hereby acknowledges due and sufficient personal service of the within citation this 17th day of April, 1896.

FREDERICK N. PAULY,

*As Receiver of the California National Bank
of San Diego, California,*

By GEO. M. COFFIN,
Deputy & Acting Comptroller of Currency.

— — —, *Attorney, and*
By EDWARD MITCHELL, *Attorney.*

[Endorsed:] United States circuit court of appeals, second circuit. Filed Apr. 16, 1896. James C. Reed, clerk.

Endorsed on cover: Case No. 16,279. United States circuit court of appeals, second circuit. Term No., 168. The American Surety Company of New York, plaintiff in error, *vs.* Frederick N. Pauly, as receiver of the California National Bank of San Diego, California. (No. 1.) Filed May 24, 1896.



N^o 168.

DEC 13 1897
JAMES H. MCKENNEY
CLERK

Brief of Davidge, Willcox & Davidge

Supreme Court of the United States *for P. C.*

OCTOBER TERM, 1897.

Filed Dec. 13, 1897.

THE AMERICAN SURETY COM-
PANY, OF NEW YORK,
PLAINTIFF IN ERROR,

vs.

FREDERICK N. PAULY, AS RECEIVER
OF THE CALIFORNIA NATIONAL BANK,
OF SAN DIEGO, CALIFORNIA,
DEFENDANT IN ERROR.

No. 168.

BRIEF FOR PLAINTIFF IN ERROR.

W. D. DAVIDGE,
HENRY C. WILLCOX,
W. D. DAVIDGE, JR.,
For Plaintiff in Error.

WASHINGTON, D. C. :
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1897.



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1897.

AMERICAN SURETY COMPANY OF
NEW YORK.

PLAINTIFF IN ERROR,

v.

FREDERICK N. PAULY.

RECEIVER.

No. 168.

In Error to the United States Circuit Court of Appeals
for the Second Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an action brought by Frederick N. Pauly, receiver of the California National Bank of San Diego, California, defendant in error, to recover from the American Surety Company, plaintiff in error, the sum of \$15,000 claimed to be due from the latter under its bond or contract of guaranty whereby it agreed to make good and reimburse to the above bank any loss sustained by it by

reason of any act of fraud or dishonesty on the part of one George N. O'Brien, its cashier.

The bond is dated July 1, 1891, and is made between the plaintiff in error, called the company, George N. O'Brien, called the employee, and the California National Bank, called the employer (R. 11-16).

The obligation of the company, as declared by the bond, is as follows (R. 12) :

" . . . The company shall, within three months next after notice, accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer of moneys, securities, or other personal property in the possession of the employee, or for the possession of which he is responsible, by any act of fraud, or dishonesty, on the part of the employee, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employee from the service of the employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, shall be *prima facie* evidence thereof. Provided always, that the company shall not be liable, by virtue of this bond, for any mere error of judgment or injudicious exercise of discretion on the part of the employee in and about all or any matters, wherein he shall have been vested with discretion, either by instruction or rules and regulations of the employer. And it is expressly understood and agreed that the company shall in no way be held liable hereunder to make good any loss which may occur to the employer by reason of any act or thing done, or left undone, by the employee in obedience to or in pursuance of any direction, instruc-

tion or authorization conveyed to and received by him from the employer or its duly authorized officer in that behalf."

This obligation is subject to certain provisions or conditions declared to be part of the bond (R. 13, 14, 15). Among these provisions are the following :

[1] " That the company shall be notified in writing, at its office in the city of New York, of any act on the part of the employee, which *may involve* a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer.

[2] " That any claim made in respect of this bond shall be in writing, addressed to the company, as aforesaid, as soon as practicable after the discovery of any loss for which the company is responsible hereunder, and within six months after the expiration or cancellation of this bond as aforesaid. And upon the making of such claim this bond shall wholly cease and determine as regards any liability for any act or omission of the employee committed subsequent to the making of such claim, and shall be surrendered to the company on payment of such claim.

* * * * *

[3] " That if the company shall so elect, this bond may be cancelled at any time by giving one month's notice to the employer, and refunding the premium paid, less a *pro rata* part thereof for the time said bond shall have been in force, remaining liable for all or any default covered by this bond, which may have been committed by the employee, up to the date of such determination, and discovered and notified to the company within the limit of time hereinbefore provided for.

[4] " That the employer shall, if required by the company, and as soon thereafter as it can reasonably be done, give all such aid and information as may be possible (at the cost and expense of the company), for the purpose of prosecuting and bringing the employee to justice, or for aiding the company in suing for and making effort to obtain

reimbursement by the employee or his estate, of any moneys which the company shall have paid or become liable to pay by virtue of this bond.

* * * * *

[5] "That no one of the above conditions, or of the provisions contained in this bond, shall be deemed to have been waived by or on behalf of the said company, unless the waiver be clearly expressed in writing, over the signatures of its president and its secretary, and its seal thereto affixed." (R. 13, 14, 15.)

The California National Bank of San Diego was organized in 1888. In January, 1891, one J. W. Collins, who had been cashier from the organization of the bank, became its president, and one George N. O'Brien, who had been a clerk, was appointed cashier. On the application of the latter to the plaintiff in error the bond was given, the limit of liability being \$15,000. (R. 12-14.)

On October 12, 1891, Collins, the president, was in New York and effected a loan from the Western National Bank of that city to the California Bank. The loan was made on the note of the California Bank for \$20,000, and on the security of promissory notes belonging to the California Bank and amounting to \$36,250. The proceeds of the loan were credited by the Western National Bank to the California Bank, and subsequently drawn out by the latter (R. 78-81). The loan was to the California Bank and not to Collins (R. 78-81). A proper record of this transaction upon the books of the California Bank would have been a credit of the amount to "bills payable" and a debit of the same to the Western National Bank. The actual entries were a debit to the Western National and a credit to Collins in his individual account and no credit to bills payable. The result of such entries was that the proceeds of the loan obtained on the credit of the California Bank and by pledge of its securities, and which

should have remained subject only to its disposal were left subject to the order of Collins by his personal check. On the 13th of October, 1891, O'Brien filled up in his own handwriting a deposit tag which represented that by telegraphic dispatch Collins had that day made a deposit in the California Bank of \$20,000. (R. 78, 107, 108, 109, 204.)

On October 12, 1891, and the following day, similar transactions took place between Collins and the United States National Bank of New York, whereby commercial paper belonging to the California Bank were rediscounted for that bank by the United States National, and placed to the credit of the California Bank. On the latter day, by means of a similar false deposit tag, the transaction was falsely entered as in the case of the Western National, and the proceeds, amounting to \$24,500, placed to the individual credit of Collins. (R. 81, 82, 107, 108, 109, 204.)

It thus appeared that as a result of O'Brien's acts in filling up the deposit tags with statements which were false in fact, Collins' account with the bank was increased in his favor in the amount of \$44,500. There was also another item in the account of Collins for \$500 obtained from the United States National in the same way, making in all \$45,000 which appeared on the books of the California Bank to the credit of Collins. (R. 107, 109, 205.)

When the bank suspended payment there were standing to his credit only \$11,420.90. This sum deducted from the \$45,000 fraudulently credited would leave a loss to the bank of \$33,579.10, for had it not been for the false credits his account would not have been sufficient to pay checks subsequently drawn upon it, and presumably they would not have been honored. (R. 325.)

The above statement is substantially that of the Court

of Appeals, and is based upon the verdict of the jury. As will be seen hereafter, the question that should have been tried was not whether O'Brien was in fact guilty of actual fraud or dishonesty, but whether his acts were of such a character as to require notice of them to be given to the company. He may have been entirely innocent of intentional wrongdoing, but the duty to notify was none the less mandatory.

There was also evidence that while before the date of the contract the account of Collins at all times showed a balance to his credit, he was, in fact, largely indebted to the bank by means of other similar false entries which O'Brien had caused to be made.

The Surety Company, at the time it made the contract which is the subject of this suit, made a similar one in the sum of \$25,000 to indemnify the bank against the misconduct of Collins, the judgment on which latter contract is before this court for review—No. 169 at the present term.

The bank suspended payment on the 12th of November, 1891, and possession of its assets was taken by the examiner. On the 18th of December, 1891, Pauly, the defendant in error, was appointed and on the 29th of that month qualified as receiver, and took possession of the assets, books, and papers. (R. 139.)

The bank, notwithstanding the fact that it had notice of the false entries by means of the deposit tags, as above mentioned, wholly failed before its suspension to give the Surety Company the notice required by the above-quoted provision of the contract "of any *act* on the part of the employee which *may involve* a loss for which the company is responsible hereunder as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer."

The receiver likewise having, as he admits, knowledge of the acts of O'Brien, likewise failed to give such notice to the company until the 1st of July, 1892, when he submitted his proof of claim for loss (R. 201). At that time the above-mentioned acts of O'Brien, and other acts of similar character, were for the first time notified to the company.

At the trial a letter from the receiver to the Surety Company, undated, but the date of which is fixed by the reply of the company, as May 23, 1892 (R. 232, 233), was given in evidence, which letter was assumed by the Court of Appeals to be a compliance with the above provision (R. 326, 327), and was treated by the trial court as evidence of such compliance to be passed upon by the jury. (R. 188, 189.) The letter is here set out in order that the court may see how far it is or ever was intended to be such compliance :

"AMERICAN SURETY COMPANY,

" 160 Broadway, New York, N. Y.

"DEAR SIR: I write to notify you that the California National Bank held a bond to the amount of \$20,000.00 in its favor for the faithful performance of duties by J. W. Collins, its late president, also in favor for the faithful performance of duties by Geo. N. O'Brien, its cashier, for \$15,000.00. I therefore notify you that a discovery of fraud has been made of sufficient amount to require the payment of those indemnity bonds to the undersigned receiver of the California National Bank.

"I therefore ask that you forward us the necessary blanks to make the claim or claims in proper form.

"Respectfully, yours,

"FREDERICK N. PAULY,

"Receiver." (R. 232).

Here are no acts notified, nor is the letter anything more than the general assertion of loss and a request for blanks, so as to make claim for the loss in proper form.

It is proper here to state that on an examination of the record it will be found that the receiver, through ignorance or mistake, appears at no time to have recognized the duty of giving the notice required by the above provision, but to have supposed that the only notice to which the Surety Company was entitled was that conveyed by the claim for payment.

At the trial the question arose as to the proper construction of the provision of the contract requiring notice of "any act on the part of the employee that *may* involve loss," or, what is the same thing, *may* involve fraud or dishonesty.

In behalf of the Surety Company, it was contended that the duty to give such notice arose when any act of the employee known to the employer imported to any reasonable mind fraud or dishonesty, and hence *might involve* loss. On the contrary, it was contended on behalf of the receiver that the duty to notify did not arise until, on investigation, the employer had become "*satisfied*" or convinced that fraud or dishonesty actually existed, and that any degree of suspicion, no matter how well founded or well calculated to govern the action of a reasonable mind, did not give rise to the duty to notify. This question was determined by the trial court against the Surety Company (R. 187), and the determination of that court was sustained by the Circuit Court of Appeals, and is now here for review (R. 328, 329).

Another question determined by the trial court and affirmed on appeal was whether the above duty was discharged "as soon as practicable" was to be determined by the jury. The court under its construction of the duty left that question to the jury on the ground of a conflict of evidence. Under a different and what is submitted to be the correct construction of the contract the question

plainly belonged to the court, for there was absolutely no contradiction of evidence in respect of knowledge of acts which to any reasonable mind must have carried the strongest presumption of loss through fraud or dishonesty. Indeed, on this point, the evidence of the receiver himself is conclusive that he knew of acts that might involve loss through fraud or dishonesty, but waited for months without giving notice.

Although the duty of the receiver, as defined by the court, was made to depend on the discovery of acts of actual fraud or dishonesty, it was still necessary that he should give notice to the company "as soon as practicable" after discovery. No notice was in fact given of such acts until the claim of loss, dated June 24, 1892, and received by the company July 1, 1892, was made. (R. 204, 234, 235.) Under the evidence the question of "as soon as practicable" was ruled to belong to the jury and was remitted to them for decision, and without proper instructions or, indeed, any instructions at all. Such question, it is submitted, belonged to the court.

Another question ruled by the trial court against the company, and affirmed by the Court of Appeals, is as follows: The contract guarantees the fidelity of O'Brien "in connection with the duties of the office or position hereinafore referred to [cashier] or the duties *to which in the employer's service* he may be subsequently appointed and occurring during the continuance of this bond, and discovered during said continuance or within six months thereafter, *and* within six months from the death or dismissal or retirement of the employee from the service of the employer." (R. 12.)

A subsequent provision requires that any claim of loss shall be made as soon as practicable after the discovery of the loss "and within six months after the ex-

piration or cancellation of this bond as aforesaid." This refers to the expiration of the bond as fixed by the above provision quoted at length—that is, by limitation or by death, dismissal, or retirement.

The duties of O'Brien as cashier ceased on the 12th of November, 1891, when the bank suspended, and was taken in charge by the examiner. On the 18th of December, 1891, the receiver was appointed, and on the 29th of the same month he qualified and dispossessed all the officers and employees of the bank. (R. 139.) He, thereupon, for his own purposes, employed O'Brien, in what capacity does not appear. (R. 139.) The claim of loss was not made until July 1, 1892—more than six months after the expiration of the contract.

The trial court contented itself with overruling the proposition that the claim of loss was not made in time. The Court of Appeals held that the employment of O'Brien by the receiver was in law the equivalent of his appointment by the bank to other duties in its service. (R. 329.)

At the trial it was in evidence that the bond was obtained from the company by misrepresentations on the part of Collins, acting as president of the bank, as to the integrity of O'Brien, and that at the time Collins knew of previous acts on the part of O'Brien and for the benefit of Collins, similar to those involved in the present suit. The said misrepresentations and knowledge were excluded from the consideration of the jury by the trial judge, and his ruling was affirmed. (R. 191, 332.) Other rulings were made at the trial, and afterwards affirmed, principally to the admission and rejection of evidence.

These, so far as here insisted on, will appear in the assignment of errors.

The complaint of the receiver contained other items

than those above mentioned (R. 6), but by the ruling of the court the area of controversy was limited to the claim in respect of the transactions of the 12th and 13th of October, 1891. (R. 174.)

Verdict and judgment for the plaintiff. (R. 200, 48.)
Affirmed on appeal. (R. 336.)

The bill of exceptions contains all the evidence. (R. 281.)

ASSIGNMENT OF ERRORS.

There was error—

1. In the refusal to charge that by the true construction of the contract it was the duty of the bank or receiver to notify the Surety Company of any act on the part of O'Brien, which, reasonably considered, *might* involve fraud or dishonesty in his office as soon as practicable after such act came to the knowledge of the bank or receiver (R. 132, 133, 173; Requests Nos. 8, 9, 10, 11; and 12, overruled, and exception; R. 175, 176, 197), and, on the contrary, in charging as follows:

“The defendant was entitled to notice in writing of any act of the cashier which came to the knowledge of the plaintiff of a fraudulent or dishonest character as soon as practicable after the plaintiff acquired knowledge. It is not sufficient to defeat the plaintiff's right of action upon the policy that it be shown that the plaintiff may have had suspicions of dishonest conduct of the cashier, but it was the plaintiff's duty under the policy, when it came to his knowledge—when he was satisfied that the cashier had committed acts of dishonesty or fraud likely to involve loss to the defendant under the bond—as soon as was practicable thereafter, to give

written notice to the defendant, * * * and in considering this you are to inquire, first, when it was that the plaintiff *became satisfied* that the cashier had committed dishonest or fraudulent acts which might render the defendant liable under this policy. He may have had suspicions of irregularities, he may have had suspicions of fraud, but he was not bound to act *until he had acquired knowledge of some specific fraudulent or dishonest act which might involve the defendant in liability for the misconduct.*" (R. 187; exception at R. 197.)

2. In refusing to rule that, whatever the predicate of the duty to notify, whether as ruled by the court or claimed in behalf of the company, the company under the evidence was not, as matter of law, "notified as soon as practicable of acts which might involve a loss as provided by the bond," and in submitting that question to the jury for determination. Motion to direct verdict on same grounds as motion to nonsuit. (R. 173, 132.)

3. In refusing to give the following instructions to enable the jury to decide the question of "as soon as practicable," as requested in behalf of the company:

"If the jury find upon the evidence that on or before the first day of February, 1892, Mr. Pauly knew of any act of O'Brien which *might* involve a loss to the Surety Company under the bond in suit, then they must find a verdict for the Surety Company. (R. 175; exception at R. 197.)

"If the jury find upon the evidence that on or before the first day of March, 1892, Mr. Pauly knew of any act of O'Brien which *might* involve a loss to the Surety Company under said bond in suit, then they must find a verdict for the Surety Company. (R. 175; exception at R. 197.)

"If the jury find upon the evidence that on or before the first day of April, 1882, Mr. Pauly knew of

any act of O'Brien which *might* involve a loss to the Surety Company, under the bond in suit, then they must find a verdict for the Surety Company. (R. 175; exception at R. 197.)

"If the jury find upon the evidence that on or before the first day of May, 1892, Mr. Pauly knew of any act of O'Brien which *might* involve a loss to the Surety Company, under the bond in suit, then they must find a verdict for the Surety Company." (R. 176; exception at R. 197.)

4. In ruling that in determining the question of whether the above notice was given as soon as practicable, the jury might consider that the receiver was engaged "more or less" in consultation with the United States attorney, and with the criminal authorities, and that his circumstances and situation did not reasonably admit of an earlier notice. (R. 190, 191; exception, R. 197.)

5. In refusing to direct a verdict for the company on the ground that the receiver had not shown "that a proof of claim was made as soon as practicable after the discovery of the loss, nor within six months after the expiration or cancellation of the bond." (R. 173, 132, first ground.)

6. In submitting to the jury the question whether the claim of loss was made as soon as practicable, and in that connection in charging:

"Now this notice (of claim) was given, the only way it could be given practically, by mail on the 24th of June, and received by the defendant on the 1st of July. Now, if it is a fact that the plaintiff was engaged more or less in consultation with the United States attorney, and with the criminal authorities, and that his circumstances and situation were such that it could not be reasonably expected of

him that he should make out this formal claim and send it before the time when he did so, then you can find the notice was given within a reasonable time and in compliance with the condition of the policy." (R. 190, 191; exception at R. 197.)

7. In charging that—

"It is said that this bond of indemnity was obtained upon an application which was certified to by the bank itself, and that in the application facts were misrepresented and facts were concealed with fraudulent intent on the part of the bank, therefore, that the bond is void. * * * The only knowledge of any facts which ought to have been communicated or were misrepresented—the only knowledge which the bank possessed at the time that application was made—was the knowledge of Collins himself. Ordinarily, a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agents; but in this case, all these transactions, if there were any transactions of a fraudulent and dishonest character on the part of the cashier, were transactions for the benefit of Collins, and he was a participator in the fraud, and, under those circumstances, the law does not infer that the agent or the officer will communicate the fact to its principal, the corporation, and, under such circumstances, the corporation is not bound by his knowledge, so this defense melts away, and there is nothing of it whatever." (R. 191, 192; exception at R. 197.)

8. In refusing to charge as follows:

"The books and papers of the bank are not of themselves, nor are any entries therein, binding upon this defendant or evidence against it, and the jury must not accept as evidence any entries therein unless established by the testimony of some witness having personal knowledge of the transaction to which the entry relates, and establishing such transaction by means of such knowledge." (R. 178; exception at R. 197.)

9. In the improper admission of evidence against the objection of the counsel of the company, as follows:

a. During the examination of Chas. L. Brimhall, a witness for plaintiff, after the witness had testified that the account of Mr. Collins was on page 120 of Ledger 4, and as to the manner of keeping said account, said judge erroneously permitted plaintiff's counsel to put said account in evidence. (R. 51.)

b. During the examination of said Brimhall, after the witness had testified that certain entries in the teller's book of the California National Bank were in the handwriting of Mr. Gregg, said judge erroneously permitted plaintiff's counsel to put the said book in evidence as plaintiff's Exhibit "M." (R. 61, Exhibit "M," R. 206.)

c. During the redirect examination of said Brimhall said judge erroneously permitted plaintiff's counsel to put in evidence as plaintiff's Exhibit "W" a certain deposit slip for \$25,000, dated March 3, 1891. (R. 74, Exhibit "W," R. 213.)

d. During the redirect examination of said Brimhall said judge erroneously permitted plaintiff's counsel to put in evidence as plaintiff's Exhibit "X" a certain deposit slip for \$20,000, dated June 6, 1891. (R. 74, Exhibit "X," R. 213.)

e. During the examination of George S. Hickok, a witness for plaintiff, said judge erroneously permitted plaintiff's counsel to ask the witness, "Will you state what the transaction was?" (R. 75.)

f. During the examination of said Hickok said judge erroneously permitted plaintiff's counsel to put in evidence as plaintiff's Exhibit "AA" a certain note for \$25,000, dated April 1, 1891. (R. 76, Exhibit "AA," R. 214.)

g. During the examination of said Hickok said judge

erroneously permitted plaintiff's counsel to ask the witness, "What was the transaction?" (R. 76.)

h. During the examination of said Hickok said judge erroneously permitted plaintiff's counsel to put in evidence as plaintiff's Exhibit "BB" a certain note for \$20,000, dated June 3, 1891. (R. 77, Exhibit "BB," R. 215.)

i. During the examination of said Brimhall the court erroneously admitted in evidence a deposit slip of May 2, 1891, antedating the bond for \$40,000, which was in the handwriting of one Harry E. O'Brien (R. 74) a clerk in the employment of the bank. (R. 75.)

10. In denying at the close of the evidence the motion of the defendant to direct a verdict for the defendant. (R. 173.)

11. In refusing to charge the jury, as requested, that "There can be no recovery in this action upon any item of claim made at this trial unless a claim in regard to such item was set forth in the proof of claim served upon the defendant in July, 1892, nor unless such item of claim has been proved upon this trial as it was set forth in said proof of claim." (R. 176, 177; exception at R. 197.)

12. In refusing to charge, as requested, that "Even if the jury find that the credits of \$25,000 and \$20,000, for which the plaintiff seeks to recover, were fraudulent and dishonest to the knowledge of O'Brien, that alone does not make out the plaintiff's claim. He must show that a loss resulted from these credits, and in considering this latter question the jury must not regard the alleged earlier false credits that have been given in evidence. These earlier credits have no legitimate bearing upon this question of loss from the latter ones." (R. 177; exception at R. 197.)

13. The trial judge, after the charge, and in reply to the following question by a juror: "If they [meaning the plaintiff] found out the fraud on the 2d day of March and notified them on the 23d day of May, would that be, in law, a notice as soon as practicable?" erroneously replied: "No; I should charge, in reference to that, that that is a question for you to determine; it is a question of fact, and not a question of law." (R. 192.)

14. The Court of Appeals erred in affirming the judgment of the circuit court. (R. 336.)

POINTS AND ARGUMENT.

POINT I.

THE DUTY TO NOTIFY THE SURETY COMPANY AS SOON AS PRACTICABLE OF ANY ACT WHICH MAY INVOLVE LOSS.

Both courts below held that the duty to notify was mandatory, and a condition precedent, failure to comply with which was fatal to recovery.

Both courts also held that the receiver succeeding to the obligation of the company took it *cum onere*, and was bound by the condition to notify.

These matters out of the way, it is proposed, briefly, to discuss, first, the *duty*, and, secondly, *whether it arose and was discharged*.

1. *The Duty.*

This is plainly a matter of construction. The parties have made their contract, and the only question is what it means. It will be borne in mind that the contract re-

lated exclusively to the relation of master and servant, employer and employee, the company undertaking to guaranty the fidelity of the cashier subject to the conditions of the contract.

In the case of such a guaranty there is at common law and wholly apart from contract, a duty on the part of the employer to notify the guarantor of the fraud or dishonesty of the employee. The employer, having the power of dismissal, cannot retain in his service at the risk of the guarantor an employee whose want of integrity the employer has discovered, or has reasonable ground to believe.

Phillips v. Foxall, L. R., 7 Q. B. 666.

Sanderson v. Aston, L. R., 8 Exch. 73.

Byrne v. Muzio, L. R. Irish (8 Q. B. C. P. & Ex.), 396.

Roberts v. Donovan, 70 Cal. 107.

Conn. Mut. Life Ins. Co. v. Scott, 81 Ky. 540.

Watertown Fire Ins. Co. v. Simmons, 131 Mass. 85.

Atlantic & Pac. Tel. Co. v. Barnes, 64 N. Y. 385.

McKecknie v. Ward, 58 N. Y. 541.

The principle finding expression in the above cases—that is, that there is some duty, not always clearly defined, due from the employer to the guarantor after the discovery of misconduct by the employee—lies at the foundation of the present contract. The parties competent to contract have undertaken to declare in plain words the duty and its limitations. The bank has said in terms: "I will notify you of any act on the part of my cashier which may involve a loss to you under your contract as soon as practicable after the occurrence of such act shall have come to my knowledge;" and the receiver has said the same thing.

The thing to be notified is the act—any act that *may* involve loss, not any act that *must* involve such loss.

The duty depends exclusively upon the character of the act. It must be an act that may involve loss. As none but fraud or dishonesty under the contract could involve loss, the act must be such as may involve fraud or dishonesty. The act need not be in itself fraud or dishonesty; it is sufficient if it may involve fraud or dishonesty. In the present case the act was, on its face, fraudulent and dishonest as both the lower courts have held.

What is the act or acts? It is in brief the act of a cashier directing the transfer of the money of the bank to a party who has no right to it and falsifying transactions by false entries.

Is such an act one that *may* involve fraud or dishonesty? It seems there can be but one answer.

Of course, an act carrying on its face fraud and dishonesty, and hence loss, may not be in fact what it appears to be. That, however, is not the question, but, on the contrary, the question is whether the act *may* be what it imports to be on its face, and hence may involve loss. The duty depends upon the inherent character of the act presented to the mind of the employer and the natural and ordinary consequences of the act and how far in common experience it is consistent with the integrity of the employee.

The theory of the courts below is that while the act imported fraud or dishonesty and the employer knew of such act, yet there was no duty to notify until the employer was "*satisfied*" by investigation that it was in fact an act of fraud or dishonesty which might involve loss. But this is not the contract. The contract says that any act that may involve fraud or dishonesty shall be notified as soon as practicable, not that it shall be investigated and notified or not according to the conclusion reached by the employer. The Surety Company contracted for

notice of the act itself, not for its trial and determination by the employer and notice of his conclusion.

It is submitted, with great deference, that the construction of the courts below is not only violative of the terms of the contract, but also of the manifest intention and object of the parties to it.

The provision is for the benefit of the company. It is one of the conditions upon which it undertook to guaranty, and its construction as here contended for, while imposing no hardship upon the employer, secures only a reasonable degree of protection to the company. It is a common provision in contracts of this description.

By the third provision of the contract, above quoted, the company has the election to cancel its bond on the terms prescribed by giving one month's notice to the employer, and by the further provision, above quoted, the employer is bound, if required by the company, to give such aid and information as may be possible for the purpose of bringing the employee to justice and of aiding the company in any effort to obtain reimbursement of any moneys which the company shall have paid or become liable to pay under the bond. Now, it is asked, of what avail are these provisions if the company is to be kept in ignorance of acts of the employee which may involve loss until the employer shall, by investigation, reach the state of "satisfaction" required by the rulings below? The two provisions of the contract last mentioned are in entire harmony with the first, and the three taken together show that to the extent of *preventing* loss, if practicable, and of obtaining indemnity the employer was, upon the discovery of acts that might involve loss, to co-operate with the guarantor by giving the notice required by the first provision and thereby enabling the exercise of the election and the recovery of the loss, as required by the third and fourth provisions.

The manifest object of requiring any act that may involve loss to be promptly notified to the company is to enable it to act with dispatch for its own protection.

The first provision is wholly different from the second. The latter relates to the claim for payment for loss, to be made as soon as practicable after *the discovery of the loss*. It was proper for the receiver, and, indeed, was his duty, to pursue his investigation so as to ascertain the loss for which the claim was to be made. He could not otherwise make the claim. His duty in this respect was essentially different from his duty under the first provision. The latter was a duty to the surety company, the former to the bank. The former related to the actual loss which had been sustained, the latter to an act which might involve loss, whether or not the loss had been actually sustained or not.

The effect of the decision below was substantially to expunge the first provision from the contract. The only right to notice accorded to the company was notice of actual loss. Its right to notice of any act that might involve loss was utterly obliterated. In the present case two notices were plainly required: first, notice of the discovered act that might involve loss, and, secondly, notice of the loss actually sustained—that is, the claim of loss. This subject was distinctly brought to the attention of the trial court by the counsel of the company, but the court ruled that two notices were not required by the contract, and an exception was taken to that ruling. (R. 133.)

It is not meant to assert that two notices in form are always necessary. Cases may perhaps be imagined where the claim of loss is made so soon after the discovery of an act that may involve loss as to make the notice conveyed by the claim a sufficient compliance with both provisions, but the case under consideration is not one of that kind.

In the charge of the court pains are taken to impress upon the jury the difference between "knowledge" and "suspicion." In the opinion of the Court of Appeals extracts from the charge are given, and then the court says:

"The exception is unsound. The charge carefully conforms to the requirements of the bond. 'Knowledge' and 'suspicion' are not synonymous terms. The bond calls for no notice of suspicions, but only for *any act* on the part of the employee which may involve loss, as soon after the occurrence *of such act shall come to the knowledge of the employer.*" (R. 328.)

The court is in error in asserting that it was ever claimed in behalf of the company that mere suspicion was sufficient to call into action the duty prescribed by the first provision of the contract.

The exception referred to is at pages 195 and 196 of the record. While it is directed in part to what was said in the charge in various forms as to suspicion, as well it might be, its main purpose was to except to the part of the charge wherein it was declared that the receiver was not bound to give the preliminary notice, as it was called, until he became satisfied that O'Brien had actually committed acts of fraud or dishonesty—that is, that the proper construction of the contract was that the company was only entitled to be notified after the question of fraud or dishonesty had been *tried and determined* by the receiver, and not when acts had been presented to him which any reasonable mind would declare might involve fraud or dishonesty.

There are many degrees of suspicion, and all of them are, of course, short of absolute knowledge. The duty of the receiver, it is conceded, did not depend upon his suspicion in the narrow sense of that word. He was not called on to infer or imagine guilt from slight evidence or no

evidence at all. On the other hand, however, he was bound to exercise that degree of judgment which any man of reasonable mind would exercise upon the act or acts which came to his knowledge, and if such act or acts, reasonably considered, might involve fraud or dishonesty, he was bound to notify the company. The standard of duty was what the act or acts fairly and reasonably imported to a reasonable mind. Such a standard of duty is universally accepted in human affairs, and the gravest responsibilities, criminal and civil, depend upon its application.

It is submitted that this standard of duty should have been given to the jury instead of the two antipodes of "suspicion" and "satisfaction." It is remarkable that the Court of Appeals, while approving the charge as to "suspicion," had not a word to say in regard to "satisfaction."

2. *Did the duty arise and was it discharged?*

These questions have yet to be tried. The questions already tried are in respect of the duty as erroneously defined—that is, the duty to notify after the receiver, upon investigation, becomes satisfied of actual fraud or dishonesty.

The questions to be tried under a proper definition of the duty are whether the company was notified of any act or acts of O'Brien that, reasonably considered, *might* involve fraud or dishonesty, as soon as practicable after such act or acts came to the knowledge of the bank or receiver.

The consideration of the latter questions in advance of a trial would be premature. It is plain that they are essentially different from those which have been tried. It may not be amiss, however, to call attention to some of

the evidences of knowledge of acts that might involve fraud or dishonesty, as disclosed by the present record.

a. Did the Duty arise?

The entries on the tags and in the books were false on their face. The Court of Appeals says the entries on the tags were "manifestly false" (R. 326), and the entries on the books followed those on the tags. Then had not the bank knowledge, in the sense in which that word is used in contracts like the present, and, indeed, in which it has been applied to the evidence by both courts, of acts that might involve fraud or dishonesty? The Court of Appeals says the false entries did not *per se prove* fraud or dishonesty, but that O'Brien might have acted ignorantly or negligently. (R. 326.) That may be so, but did not the false tags and entries involve fraud or dishonesty until explained, and hence was it not the duty of the bank to notify the company? Both courts below seem to assume that nothing short of evidence sufficient to convict O'Brien could call into activity the duty to notify the company. But O'Brien was not on trial, and the predicate of the duty of the bank to the company was very far from the predicate of the conviction of O'Brien. The bank then had knowledge, not of the actual guilt, but of acts that might reasonably involve guilt, and yet the bank failed to notify the company.

The same acts that might involve guilt known to the bank were also known to the receiver.

He was examined as a witness. It is proper to say that according to his conception of his duty, it did not extend beyond the duty to notify the company until he had become "satisfied" or convinced of actual fraud or dishonesty, and hence loss. This is perfectly manifest.

He did not recognize the duty under discussion and made no attempt to discharge it. As thus enlightened, his evidence on this point is here set out :

“ Q. When did you make, if ever, any examination by yourself or employees of the account of J. W. Collins with the bank ?

A. I think my examination began early in 1892, January or February ; I think January. (R. 137.)

Q. Well, how was that examination prosecuted and what time did it take ?

A. I had an expert bookkeeper employed for a period of three months. (R. 137.)

Q. Did you or not find any errors or irregularities in the account of J. W. Collins with the bank ?

A. The bookkeeper found them. (R. 137.)

Q. When or about what time ?

A. That was some time in the first three months of the year—January, February or March. I think I became aware in January that there were irregularities in the account. (R. 137.)

Q. Well, when did you discover the amounts and special conditions, if any, of such irregularities ?

A. Well, I should suppose that would probably date from the time of the completion of the examination of the expert bookkeeper ; just when I don't know ; that may be ascertained from the books. (R. 137.)

Q. Did you or not become aware of any real irregularities or loss to the bank through J. W. Collins, and if so, state what you did about it ?

A. When I became aware that they were——

Q. (Interrupting.) The question is, did you become aware ?

A. Yes, sir ; I became aware that there were irregularities in Mr. Collins' account and that the bank had suffered loss from his defalcation. (R. 137.)

Q. Then what did you do about it ?

A. When I became aware of it I made it known to the American Surety Company that I had discovered evidences of fraud on the part of J. W. Collins. (R. 137.)

Q. Well, how long after you became aware of them?

A. How long after I became aware of them?

Q. Yes.

A. I can't state that exactly; it may have been two months. (R. 138.)

Q. Well, why did you wait two months before giving information to the American Surety Company about these losses?

A. Because of the extensive business I had on hand and the many matters that were calling for attention every day. (R. 138.)

Q. Well, did you have to carry on or not any consultations concerning these losses?

A. Yes; I consulted my attorney. (R. 138.)

Q. When did you commence your examination of the affairs of the bank?

A. I presume immediately after I took possession, I might be said to have commenced my examination, as I did. (R. 140.) [He took possession on the 29th of December, 1891.]

Q. And how soon after your appointment was it that you were advised or were led to believe that there was a shortage in the account of Mr. Collins?

A. I cannot answer that with any definiteness; I think within the first two weeks, probably, I was aware of some irregularities. (R. 141.)

Q. You say you became aware of irregularities. Do you state that of your own knowledge that you know there were irregularities?

A. No, not then. (R. 141.)

Q. Do you mean somebody informed you?

A. Yes; I mean some information was dropped. (R. 141.)

Q. And in your testimony that you have given here, on this examination, when you speak of having become aware of irregularities, do you mean you knew of your own knowledge that there were irregularities?

A. Well, now that depends; I am certainly convinced now, if you talk about now, that there were irregularities; if you ask me about that time, then I will say the informa-

tion came to me from other sources, and I had my suspicions awakened. (R. 141.)

Q. Now you say you are convinced of irregularities?

A. Yes. (R. 141.)

Q. Does not that arise from information given you by others, and obtained, possibly, from books of the bank?

A. It does. (R. 141.)

Q. You had no knowledge of the transactions themselves in the first instance?

A. I had not. (R. 141.)

Q. You have no knowledge now of the transactions?

A. No, except as they come from the books. (R. 141.)

Q. So your conviction arises simply from information from books and papers in the bank or given you by others?

A. That is true. (R. 141.)

Q. I understand you to say that early in the year 1892 you presented the matters involved in the alleged acts of Mr. Collins and Mr. O'Brien to the district attorney of the southern district of California; can you give us the precise time when you did so consult the district attorney on the subject?

A. Not from memory. (R. 143.)

Q. About what time was it?

A. I think about some time in January, or, possibly, in February. (R. 143.)

Q. Did you go before the grand jury of the United States for the southern district of California and present complaints against Mr. Collins and Mr. O'Brien?

A. No, sir. (R. 143.)

Q. Did the district attorney present complaints against Mr. Collins and Mr. O'Brien, based on the information you had given him?

A. Not before the grand jury. (R. 143.)

Q. Your accent on the words "grand jury" leads me to ask whether it wasn't some other jury that you presented that to?

A. No, it was not presented before another jury. (R. 143.)

Q. To whom were the complaints presented?

A. Before a commissioner as to Mr. Collins.

Q. And to whom were they presented in relation to Mr. O'Brien?

A. Before the grand jury. (R. 143.)

Q. Was an indictment found against Mr. Collins?

A. Yes, sir; let me see; the complaint was sworn out against him; but whether it got to an indictment I am not sure. (R. 143.)

Q. About when was the complaint sworn to?

A. I should think about the middle of February. (R. 143.)

Q. When did you first have knowledge of the particular acts of fraud or mismanagement which may or may not have occasioned loss to the California bank?

A. I cannot fix that date to any certainty. I suppose it was some time in the fore part of 1892, probably February or March; it must have been February, because Mr. Collins was arrested. I don't remember the period exactly." (R. 163.) [Collins died 3d March, 1892. (R. 123.)]

In the proof of claim, sworn to by the receiver on the 24th of June, 1892, he used this conclusive language:

"That heretofore, on the 18th of December, A. D. one thousand eight hundred and ninety-one, he was, by the Hon. E. S. Lacy, Comptroller of the Currency of the United States, appointed receiver of the California National Bank of San Diego. * * *

"That immediately after his appointment as such receiver being advised that George L. O'Brien, the then cashier of said association, was thought and believed to have issued certificates of deposit without authority, and to have made false entries upon the books of the bank; and to have been guilty of fraudulent conduct in connection with discharge of his duties as such cashier, . . ." (R. 201.)

Other evidence on this point might be here referred to, but it does not seem necessary.

What is, in substance, his evidence? He does not deny knowledge of the entries on the tags and books in his possession, nor that such entries, to his mind, might involve fraud or dishonesty. He became aware of what he mildly terms "irregularities" in January, 1892, having commenced an examination of the affairs of the bank immediately after he took possession (December 29, 1891). In February he knew of particular acts of fraud that might have caused loss. His sense of duty prompted him to lay the matters involved in the acts of Collins and O'Brien before the district attorney (Rec. 143) (who was also his private counsel, R. 167), and the result was the arrest in February of Collins, and a complaint being presented to the grand jury in the same month, sworn to by, or based on the information given by, the receiver. (R. 143.) The same sense of duty led him to employ experts to examine the books of the bank so as to ascertain the extent of the loss.

Now, it may be safely asserted, what had come to his knowledge and was sufficient to impel him to invade the personal rights of his fellow-men and to enter upon the long investigation of the books, were sufficient to require him to notify the company of acts that might involve loss. So much as to whether the duty arose.

b. Was it discharged?

It was not, nor was there any effort to discharge it. It is true that the trial court assumed that the letter of May 23, 1892 (Rec. 232), was such a notice as the duty required, but it is only necessary to read the letter to be satisfied that it related in no sense to the duty under discussion. It was a general notice of loss claimed on ac-

count of actual fraud, a notice common in policies of insurance, but having no place in the present contract. The letter says "that a discovery of fraud has been made of sufficient amount to require the payment of these indemnity bonds," etc., and requests that blanks be forwarded to enable the claim or claims to be made in proper form. It does not relate to future loss, or any act or acts that may involve it.

As the court construed the contract, the employee was under no obligation to notify the company, save after the discovery of actual fraud or dishonesty involving loss. Under that construction the letter might be a notice of actual fraud and consequent loss, but not even then, in the language of the charge, of "acts of dishonesty or fraud *likely* to involve loss to the defendant," or "of some specific fraudulent or dishonest act which *might* involve the defendant in liability for the misconduct." (R. 187.)

As stated above, it is manifest from the evidence that by the receiver's construction of the contract, it was not incumbent upon him to give any notice to the company, save the claim of loss under the second provision of the bond to be made after the discovery of actual fraud or dishonesty and the loss thereby; and he acted on that theory throughout. His construction simply obliterated the first provision.

What has been said at perhaps unpardonable length will, it is hoped, satisfy this court that if the definition of "duty" here insisted on be correct, then the judgments below were a great wrong to the plaintiff in error.

POINT II.

ASSUMING THAT THE DUTY OF THE RECEIVER WAS AS DEFINED BY THE TRIAL COURT TO NOTIFY THE SURETY COMPANY OF ACTS OF FRAUD OR DISHONESTY WHICH MIGHT INVOLVE LOSS AS SOON AS PRACTICABLE AFTER HE BECAME "SATISFIED" THAT SUCH ACTS HAD BEEN COMMITTED, THE DUTY WAS NOT DISCHARGED.

No notice was given until July 1, 1892, when the claim for loss dated June 24, 1892, was received. The purpose of the notice was to enable the company to protect itself against the acts required to be notified. It surely cannot be contended that the letter of May 23, 1892, stating no acts, was a fulfilment of the duty even under the construction of the court. In this connection the attention of the court is called to the evidence of the receiver set out under our first point. While in respect of the claim of loss, accompanied by proofs of acts of misconduct and the amount of pecuniary loss, there might be some excuse for delay, can any be imagined with regard to the acts themselves?

The burden of proof was on the plaintiff below to show he had given the notice as soon as practicable, and it is submitted that, as matter of law, the duty was not discharged.

The evidence was that the receiver had discovered acts of fraud or dishonesty which might involve loss in January, February, and March.

In the bill of particulars offered in evidence by the defendant below (R. 136), he states that he took possession as receiver December 29, 1891, and that the acts of "fraud

and dishonesty" mentioned in the complaint were discovered *during February and March, 1892.* (R. 34.)

He testifies that *within two weeks* after his *appointment*—which was December 18, 1891—he was “aware of some irregularities” in Collins’s account (R. 141); that he “completed his examination” *in two or three weeks* (R. 164); that it may have been *two months* after he became aware of Collins’s fraud before he informed the Surety Company (R. 138); that some time in January or February he presented the matters involved in the acts of Collins and O’Brien to the district attorney; and that the district attorney presented criminal complaints against Collins and O’Brien, either sworn to by the receiver or *based on the information he had given*, and that the complaint was sworn to against Collins about the middle of February (R. 143); and that it *must have been in February* when he first had knowledge of the *particular acts of fraud or mismanagement which occasioned loss to the bank, because Collins was arrested* (R. 163), and Collins died March 3, 1892. (R. 123.) He testifies that in the first instance he rejected all claims made against the Bank, *involving items included in his claim against the Surety Company.* (R. 163.)

The Western National’s proof of claim is dated *March 5, 1892* (R. 219–222), and was sent to the receiver at that time. (R. 79.) It was rejected by a letter dated March 28, 1892. (R. 314.)

The receiver made a report to the Comptroller, dated *January 27, 1892*, in which he mentioned (among others) the \$20,000 Western National Bank item (R. 145), which he afterwards rejected when presented as claims.

The situation, in brief, then, is this:

Dec. 18, 1891, appointment of receiver.

Dec. 29, 1891, the receiver took possession.

In January or February, 1892, he swore to complaints against Collins and O'Brien.

January 27, 1892, he included in his report to the Comptroller some of the very items now sued on.

In March he rejected the Western National Bank item sued on.

He expressly says that in *February or March*, 1892, he "*discovered*" the *very acts relied on in the complaint*.

He makes like statements again and again.

June 24, 1892, he writes his notice, and verifies his proof of loss. (R. 204, 235, 237.)

Upon these conceded facts had the receiver a right to wait *until the end of June* before notifying the company, when the surety expressly stipulated that it should have notice of acts which might involve loss as soon as practicable after discovery?

The receiver, to break the force of the testimony already referred to, put on the stand Bloodgood, an assistant of Sparks, the latter being the expert employed to investigate the books, omitting to call Sparks himself, from whom he had learned of some of the acts (R. 97, 142), although Sparks still lives in San Diego. (R. 123, 141.)

He then sought to prove by Bloodgood, *when Bloodgood himself* discovered the loss. To this it was objected that it was of no consequence when Bloodgood discovered it, and that the question also called for his conclusion as to what constituted a discovery, but the answer was admitted over our exception. (R. 98.) Of what avail was this to the plaintiff? Having sworn explicitly that he (plaintiff) discovered the loss in February or March, and it appearing also by the facts in detail that this was the true date, what difference did it make when some one else discovered it?

It may not be amiss, however, simply to call attention

to the testimony, as showing when Bloodgood himself really discovered it. He reveals the fact that the bank examiner gave to the receiver a "statement" showing what corrections ought to have been made in the books, and that he (Bloodgood) then "checked up" that statement. (R. 118.) This was in January. (R. 118.) Among others, he "checked up" the U. S. National Bank item of \$25,000—one of the very items afterwards sued on—looking especially to see whether any of those amounts were credited to Collins's account. He also examined as to certificates of deposit. And he actually "found out" that Collins had been credited with three of the items in suit. (R. 119.) There was not much search needed after all, for the bank examiner himself had expressly written: "Charge Collins and credit U. S. National Bank." (R. 120.) Bloodgood did not know, he says, that this was "fraud or dishonesty" till the U. S. district attorney told him so, and he tries to put this in May. (R. 121.) But complaints were sworn out against Collins and O'Brien in February (R. 143), and Collins died on March 3, 1892. (R. 123.) And the receiver, on January 27, 1892, made his report to the Comptroller, including three items now sued on (R. 145), two of them being certificates of deposit signed by O'Brien. (R. 61, 62.)

If, then, it were possible to raise an issue of fact as to the time when *the receiver* made a certain discovery, by setting against his own repeated statements of this time—Bloodgood's statement—when he (Bloodgood) discovered it, does Bloodgood's own testimony show that the discovery was made at any different time from that stated by the receiver?

We shall offer but little more upon this branch of the case. It deserves mention perhaps that at the outset a motion was made to dismiss the complaint upon the show-

ing of dates made by the complaint and the bill of particulars. (R. 47.) The court ruled in our favor. Thereupon the receiver amended by changing these dates. (R. 48.) Of course the old statement was still competent evidence, and we introduced it as such. (R. 136.) While the *pleadings* were changed the final state of the *evidence* supported the original state of the pleadings, and the same ruling, we submit, should have been made when the same question was again presented.

Attention should here be called to the amended bill of particulars, filed during the trial, in which the receiver states that he discovered the acts of fraud and dishonesty referred to in paragraph 9 of the complaint between the 1st and 23d of May, 1892. The acts referred to in that paragraph are the acts of dishonesty or fraud which actually had involved loss. We are discussing here when those acts of fraud or dishonesty which might involve loss came to the knowledge of the receiver. Besides, even if the bill of particulars had been so amended as to apply to the acts of fraud or dishonesty, which might involve loss, the bill is not evidence. It is only a sworn statement of what the plaintiff below expects to prove, and its office is only to limit and restrict the trial and the recovery.

It seems so incredible that the surety's rights in this case should have been disregarded, as we have seen that they were, as to make it worth while to point out the possible explanation of the mystery. The receiver was working to get possession of all Collins's assets before letting the surety know anything about his danger, and in this he succeeded. (R. 238-241.)

Whether the duty to notify the company of any acts of fraud or dishonesty was discharged is, under the evidence, a question for the court? The facts are admitted. It

is true, the receiver swears to a number of dates upon which he discovered the acts of alleged fraud. His testimony has been collated and set forth in our first point. His evidence is perfectly clear, however, that he discovered the acts *within a certain period*. Whether it be January, February, or March that he discovered them, he swears to the period within which he made his discovery. The inquiry is thus reduced to a certainty. The receiver has sworn that by a certain time at the farthest he had knowledge of the acts of fraud or dishonesty which might involve loss. Bloodgood, it is true, testified when he (Bloodgood) discovered them and when he told Pauly, trying to fix the date of the discovery of the acts as late as May. But this avails the plaintiff below nothing, for the receiver having sworn as to when *he* (the receiver) knew, at what later date some one else knew and told the receiver is perfectly immaterial.

In this state of the evidence, the receiver having conclusively admitted that by the end of March, at the farthest, he had knowledge of acts of fraud or dishonesty, which might involve a loss under the bond, and it appearing that these acts were not notified to the company until the 24th of June, 1892, the court was asked to direct a verdict for the defendant; and also to instruct the jury that as to the items of October 13th and 14th, the only ones left in the case, the plaintiff could not recover. But the court refused to do this and exceptions were noted. (R. 173, 176, 197.) The defendant also requested the court to instruct the jury that if they found "that on or before the first day of February, 1892, Mr. Pauly knew of any act of O'Brien which *might* involve a loss to the Surety Company under the bond in suit, then they must find a verdict for the Surety Company." (R. 175.)

Again, that if they found that on or before the first day

of March, 1892, Mr. Pauly knew of any act of O'Brien which might involve a loss to the Surety Company under said bond in suit, then they must find a verdict for the Surety Company. (R. 175.) And a similar instruction was requested, that if on or before the first day of April, etc., and still a similar one for the first day of May, all of which were overruled and exceptions noted. (R. 175, 176, 197.)

Again, just after the charge had been delivered, a juror asked the following question :

"A JUROR. May I ask a question on a point of law? If they found out the fraud on the second day of March and notified them on the 23d day of May, would that be, in law, a notice 'as soon as practicable'?"

"The COURT. No. I should charge in reference to that, that that is a question for you to determine. It is a question of fact and not a question of law.

"The JUROR. I misunderstood. I thought it was a question of law.

"Mr. STRONG. I desire an exception to this.

"The COURT. Yes." (R. 192.)

The evidence showed a discovery of acts which might involve loss under the bond *on or before a certain time*. The trial judge was requested to determine whether or not the lapse of time proven was "as soon as practicable." This he refused to do. This was error.

What is "as soon as practicable," like what is a reasonable time, when the facts are admitted or clearly proven is a question of law.

"What is a reasonable time [within which to transfer a note] is a question of law, depending upon all the circumstances of the particular case."

Paine v. Central Vermont R.R. Co., 118 U. S. 152, 160.

See also—

Morgan v. United States, 113 U. S. 476, 501.

Maher v. Harwood, 112 U. S. 354.

Wollensak v. Reiter, 115 U. S. 96.

Nunez v. Dantel, 19 Wall. 560.

Standard Oil Co. v. Van Etten, 107 U. S. 325.

Toland v. Sprague, 12 Pet. 300.

Wiggins v. Burkam, 10 Wall. 129.

See also the following cases, where it was held that the question whether the abandonment of property to insurers was made in due time is not a question of fact to be left exclusively to the jury, but to be decided by them under the direction of the court.

Livingston v. Md. Ins. Co., 7 Cranch, 506.

Chesapeake Ins. Co. v. Stark, 6 Cranch, 268.

Md. Ins. Co. v. Ruden, *id.* 338.

The trial court was asked to decide this question or to leave it to the jury under proper instructions. It refused. This was error.

Thorwegan v. King, 111 U. S. 549.

Richardson v. Boston, 19 How. 263.

C. & O. Canal Co. v. Knapp, 9 Pet. 541.

Hogan v. Page, 2 Wall. 605.

POINT III.

THE CLAIM, OR PROOF OF LOSS, WHICH WAS MAILED TO THE COMPANY JUNE 24, 1892, AND RECEIVED JULY 1, 1892, WAS NOT SERVED AS SOON AS PRACTICABLE AFTER THE DISCOVERY OF A LOSS FOR WHICH THE COMPANY WAS RESPONSIBLE.

The bond provides that the company will pay, within three months after notice, accompanied by proof of loss.

(R. 12.) The proof was to be a written statement of the loss, certified, etc., and was to be furnished "as soon as practicable after the discovery" of the loss. (R. 13.)

The evidence on this point has already been set out under our first and second points. It is only necessary here to refer to it.

The evidence there set out shows that the receiver discovered the losses within a certain period—that is, by a certain time—the end of March at the farthest, and the evidence also shows that he delayed sending his proof of claim until June 24, 1892.

The testimony showing when the losses were discovered and the contract requiring a proof of loss as soon as practicable after the discovery of loss, the defendant moved the court for the direction of a verdict, upon the ground, among others, that the plaintiff had not shown that a proof of loss had been made as soon as practicable after the discovery of the loss. (R. 173, 132.) But the motion was denied, and an exception noted. (R. 133.) The defendant requested the court to instruct that "If the jury find, upon the evidence, that on or before the first day of March, 1892, Mr. Pauly knew of any of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company." (R. 176.)

And it also requested the court to instruct that "if the jury find upon the evidence that on or before the first day of April, 1892, Mr. Pauly knew of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company" (R. 176); and also that "if the jury find upon the evidence that on or before the first day of May, 1892, Mr. Pauly knew of any of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company." (R. 176.) But the court refused to grant these prayers and exceptions were noted. (R. 197.)

The court, as in our last point, was asked either to pass upon what was, as soon as practicable, or leave that question to the jury under proper instructions. It refused to do either. It did, in fact, instruct the jury that the proof of loss was to be sent to the company as soon as practicable after discovery of loss, but it was left to the jury to say, totally without restriction, what they thought "as soon as practicable." Moreover, the court went further than this; it instructed the jury that in making up their minds in this unlimited manner of what was "as soon as practicable," they might deduct the time the receiver spent in consultation with the United States attorney and the criminal authorities. (R. 191.) In other words, what was "as soon as practicable," would, first, depend upon the unrestricted judgment of the jury, and, secondly, upon the engagements of Pauly with the United States (and his own) (R. 167) attorney.

POINT IV.

THE BOND WAS OBTAINED BY FRAUD. THE MISREPRESENTATIONS AND CONCEALMENT OF COLLINS, THE PRESIDENT AND MANAGER OF THE BANK, RENDERED THE CONTRACT VOID.

The court erred in charging the jury: "It is said that this bond of indemnity was obtained upon an application which was certified to by the bank itself, and that, in the application, facts were misrepresented and facts were concealed with fraudulent intent on the part of the bank, therefore, that the bond is void. * * * The only knowledge of any facts which ought to have been communicated or were misrepresented—the only knowledge which the bank possessed at the time that application

was made—was the knowledge of Collins himself. Ordinarily, a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agents; but, in this case, all these transactions, if there were any transactions, of a fraudulent and dishonest character on the part of the cashier, were transactions for the benefit of Collins, and he was a participator in the fraud, and, under those circumstances, the law does not infer that the agent or the officer will communicate the fact to its principal, the corporation, and, under such circumstances, the corporation is not bound by his knowledge, so this defense melts away and there is nothing of it whatever." (R. 192, 193; exception R. 196.)

At the close of the evidence, a motion was made to dismiss the complaint, or direct a verdict in defendant's favor. (R. 173.) It was based upon the ground (among others) of misrepresentation in the application for the bond—misrepresentation by O'Brien and by Collins, *and misrepresentation by the bank itself acting through Collins.* (R. 173).

There were concealment and misrepresentation as to material facts. A few words of explanation will be needed to make the situation clear.

The sole charge at the trial against O'Brien, it will be remembered, is complicity in frauds of Collins. It asserts that to aid Collins in stealing moneys of the bank, O'Brien allowed him to be credited personally with large sums of money, to which he was not entitled, and then to draw these moneys out. These are the false entries spoken of in the complaint and bill of particulars. In support of this charge, plaintiff introduced Collins's account from the ledger, and then undertook to prove that many of the credits therein were given to him, when they should have been given to the bank. This was also

necessary, in order to prove any loss at all. For by the ledger account itself Collins still had a balance to his credit when the bank closed its doors. (R. 53.) The theory of the plaintiff was to strike out of the account a number of its credits, thus leaving it overdrawn. The propriety of thus attacking the account will be submitted to the court under another point. Here we shall assume, for argument's sake, that it was proper, and to proceed to inquire what effect it had upon our affirmative defences of concealment and misrepresentation. It is not necessary to refer to details of the testimony. Substantially, the one purpose for which plaintiff's witnesses were called, as the entire record reveals, was to show that at different times, during the period covered by Collins's ledger account, entries were made, fraudulently crediting to Collins moneys that should have been credited to the bank. Many of these alleged "false credits" were prior to the date of the bond sued on—July 1, 1891. (R. 11.) There is absolutely no difference between the character of the transactions charged against Collins and O'Brien before and after that date. If any were "fraudulent and dishonest," all were. What was done after the defendant became surety was precisely the same as that done before. But *nothing was said* to the surety of all this, and it was *absolutely ignorant* of it. (R. 171.) Still further, *a written statement* was made to the surety, as to O'Brien, *before it consented to become his surety*. It consisted of two parts—one made by O'Brien himself, and the other *by the bank as his employer*. In the first, O'Brien states that he has never been in arrears or default in his present employment; that his accounts were last examined by the bank examiner, and that they were found correct. (R. 318.) In the second, Collins, *acting for the employer, and signing as president of the bank*, states that O'Brien had always

performed his duties in a faithful and satisfactory manner ; that on March 28, 1891, his accounts were examined and found correct in every respect ; that he was not in arrears or default, and that nothing was known affecting his title to confidence, and no reason why the bond for his fidelity should not be issued. (R. 321.)

All this was said of one who, according to the receiver, (and for the purposes of the point now presented, his charge must, as against himself, be taken to be true), had been guilty of continuous frauds, involving the repeated falsification of the very accounts which the surety was assured were "correct in every respect." It was said by the very one to whom the surety was forced to apply for the desired information ; who was, by all other officers of the bank, left in sole control of its affairs ; and who was, therefore, the proper and, indeed, only person from whom such information would, or could, come. If the statements were false, no one knew this better than Collins. And yet it is said that his statements were not those of the bank, and his knowledge was not its knowledge. Nothing that he knew can be imputed to it, and for nothing that he said can it be held responsible. The reason given is that all these alleged frauds were for his sole benefit, and he, therefore, does not represent the bank in this concealment and misrepresentation. Let us see what this involves. Here is a bank whose directors leave its entire management in Collins's hands. He "runs the bank." (R. 157, 159, 160, 161.) He determines to obtain a bond for the fidelity of O'Brien, the cashier. According to the receiver's theory, a series of frauds has been going on for seven or eight months, in which O'Brien is his tool, but from which only Collins derives benefit. These frauds are concealed from the surety, and are continued in precisely the same way after the giving of the

bond. Of course, Collins knows all about them when the bond is applied for and received.

Upon these facts how can it be claimed that the bank is not affected by his knowledge, his concealment, and his misrepresentations? There seems to us to be no basis for such a claim. It is idle to stop to cite authorities, holding that a contract procured by fraud cannot be enforced by the guilty party himself. That proposition will not be disputed, even by the defendant in error. His claim is that the *party* here was *not* guilty of the fraud. He wishes to divorce the bank from any connection with, or responsibility for, Collins in this transaction. This, of course, raises a different question, upon which it may, at the outset, be said to be the general rule that any principal, however innocent, is responsible for his agent's fraud in a transaction on the principal's behalf and for his benefit.

This rule has been applied in the case of a surety's contract to relieve the surety.

Drabek v. Grand Lodge, 24 Ill. App. 82, 89.

Franklin Bank v. Cooper, 36 Me. 179, 196.

Graves v. Lebanon Bk., 10 Bush (Ky.) 23, 29.

The question may come up in two ways. Sometimes the principal is the defendant and is sued by the defrauded party. In such cases it is held that he cannot, while retaining the very benefit secured by the agent's fraud, escape responsibility for this, however innocent he himself may be.

Veazie v. Williams, 8 How. U. S. 134, 157.

Bennett v. Judson, 21 N. Y. 238.

Nat'l Ins. Co. v. Minch, 53 N. Y. 144, 149.

Holden v. Erie Bank, 72 N. Y. 286.

Sometimes he is the plaintiff, and the defence rests upon the fraud of his agent. Here it has been declared to be a rule, without exception, that he cannot undertake to *enforce the contract* without becoming responsible for all the instrumentalities by which it was obtained.

Elwell v. Chamberlin, 31 N. Y. 611, 619.

Is not the case at bar directly within these authorities? It would seem so. But the receiver says that in this transaction Collins was not the agent of the bank, because Collins was robbing the bank. Neither the assertion, nor the reason given for it, will stand examination.

If Collins were not the agent of the bank in this transaction, then it, a corporation, which can only speak and act by agents, appeared and acted in the transaction without *any* agent. There are three parties to the bond—the surety, the employee, O'Brien, and the employer, the bank. (R. 12.) There could not be any such bond without these three parties. Nor could the bond be obtained without an application of the employee, fortified by the employer's certificate. All these things we find in *form*. And we now have this receiver insisting that there was a bond in *fact*, valid in *law*, and enforceable for \$15,000. He wants the bond, and merely seeks to ignore the employer's certificate by which it was secured. In one word, he asks to enjoy the benefit of the contract, and to repudiate the means by which it came into existence, even though this compel him, as we have seen, to assert that *no one represented the bank* in this transaction. Nor does the reason assigned by him help matters any. Suppose Collins to have been guilty of all the misconduct charged. Is that any reason why a surety should be deceived into becoming such? It is not a mere question of imputing to a principal an agent's knowledge. Even there nothing

more has ever been held, so far as we can discover, than that the other party to the transaction, colluding with the agent, cannot escape the consequences by imputing the agent's knowledge to the principal ; or again, that where the fraudulent agent is himself a party to the transaction, it will not be held that he also represented the principal in it, so as to charge the latter with the consequences of his knowledge. Even this latter proposition does not carry universal assent, where, in fact, he *does* act also for the principal.

Holden *v.* Erie Bank (*supra*).

But in the case at bar we have no such state of facts. Collins did not even pretend to act in this transaction for himself. The surety had not only no means of knowing, but no cause to suspect, that he had any personal interest in the matter. He assumed to act for the bank, and for it alone, and in *form* ; *i. e.*, upon the face of the transaction, he did act for it alone. By so acting, he procured from the surety the obligation now sued on. And the receiver's proposition is that because, unknown to the surety, Collins was engaged in a course of fraud and robbery of the bank, the latter is entitled to the benefit of the obligation so obtained. In a word, his position is this : Collins and O'Brien are principal and accomplice in robbing the bank. Apprehending naturally that some day or other all may come out, they magnanimously determine to cast an anchor to windward for the bank, and enable it to shift the loss upon some one else. So they get the bond in suit, regardless of any fraud that may be incidentally necessary. And now, the receiver says, their plan has succeeded. The bank may *enforce this bond*, and the surety must suffer the consequences of his misfortune in not divining the fraud and declining to give the bond.

To put it in a nutshell, he asserts that Collins, professing to represent the bank, representing no one else, much less himself, in the transaction, may secure this bond by fraud, and that the bank may then ratify his act in obtaining the bond, and may enforce the bond, while repudiating or disclaiming the fraud.

We have seen no case remotely sustaining that proposition. Cases holding that the innocent obligee may enforce the surety's obligation, despite any and all fraud committed by the surety's principal upon him, have no bearing whatever. In such cases the plaintiff has not committed any fraud himself, nor is there any approach to an agency between him and the person who did commit it. They furnish, therefore, no analogy, much less authority, for the case at bar.

POINT V.

THE CLAIM OF LOSS WAS NOT GIVEN TO THE SURETY COMPANY WITHIN THE LIMIT OF TIME PROVIDED.

By the contract the company agrees to pay three months after notice accompanied by satisfactory proof of loss has been given. (R. 12.) This notice "shall be in writing, addressed to the company, as aforesaid, *as soon as practicable* after the discovery of any loss for which the company is responsible, and *within six months* after the expiration or cancellation of this bond as aforesaid." (R. 13.)

The bond expired by its limitation of one year and also by the "death, dismissal, or retirement of the employee from the service of the employer;" and, within six months thereafter, the claim of loss was required to be made.

The bank suspended on the 12th of November, 1891. The receiver was appointed on the 18th of December and qualified and took possession on the 29th of that month. O'Brien ceased to act as cashier on the 12th of November, 1891. He was, however, employed by the receiver, in what capacity does not appear, but there is no pretence that he continued in the service of the bank (the employer). On the 2d of March, 1892, O'Brien "left." (R. 107.) He did not "voluntarily resign," as stated by the Court of Appeals. (R. 320.) The claim of loss accompanied by proofs, dated the 24th of June, 1892, was not received by the company until the 1st of July, 1892. (R. 190.) The trial court properly distinguishes between the letter of the 23d of May, 1892, and a claim, and concedes that the letter did not constitute a claim as required by the contract. (R. 190, 191.) Thus it plainly appears that more than six months elapsed before claim was made. The trial court, after this concession charged :

"Now, if it is a fact that the plaintiff was engaged more or less in consultation with the United States district attorney and with the criminal authorities, and that his circumstances and situation were such that it could not be reasonably expected of him that he should make out this formal claim and send it before the time when he did so, then you can find the notice *was given within a reasonable time and in compliance with the condition of the policy.*"

And the court adds :

"This condition, like the other, affords a legitimate defense, even though you should think it *an unconscionable defense.* It is a legitimate defense, because it was one of the things agreed to on behalf of the bank, which was secured by the bond." (R. 190, 191.)

This was surely "scant courtesy" to a party whose of-

fence consisted solely in seeking to be bound by its obligation as made and not some other obligation.

Of the same tenor was the charge in respect of the other notice already discussed, the court charging :

“ Now, gentlemen, if this notice was not given conformably to the condition of the bond, the plaintiff is not entitled to recover, however *unmeritorious this position may be* in point of morals on the part of the defendant.” (R. 191.)

The part of the charge first quoted was excepted to. (R. 196.)

It needs no argument to show that the limit of time fixed by contract could not be extended save by mutual consent, especially in the case of a surety, nor that if it could the evidence afforded any pretext for the jury to absolve the receiver from the contract. All the evidence is in the bill of exceptions. (R. 281.)

This ruling of the trial court was not acted on by the Court of Appeals, but, *sub silentio*, that court, however, held the company bound upon the ground that the contract was for the fidelity of O'Brien “ in connection with the duties of the office or position hereinafter referred to, or the duties to which *in the employer's service* he may be subsequently appointed,” and that as he continued for several months in the service of the receiver, he was thereby discharging duties to which, *in the employer's service*, he was subsequently appointed. (R. 329.) This ruling raises a very serious question.

O'Brien ceased to act as cashier on the 12th of November, 1891. (R. 34.) On the receiver taking possession on the 29th of December, 1891, all the officers and employees of the bank were dispossessed. (R. 139.) The receiver was asked :

"Q. What did you do towards preventing the officers or employees of the bank from acting any further in their respective capacities?

"A. They were not permitted to act any further in their respective capacities; they were dispossessed; I had charge of the California National Bank affairs, and I do not know what I can specifically allude to as preventing them, except that I was in possession and kept them from having possession.

"Q. And what day was it when you took possession?

"A. On the 29th of December, 1891." (R. 139.)

Again he is asked:

"Q. After you took charge, did you continue any of the officers of the bank or its employees in your employ?

"A. For a short time, George O'Brien." (R. 139.)

There is not a particle of evidence to show what the duties of O'Brien were in the employ of the receiver, or how far they were similar to any duties which in the service of the bank he might have been appointed to discharge. They might have been wholly different in kind, and have involved different responsibilities from any for the discharge of which he could have been appointed by the bank. If, as seems must be the case, the character of duties under the employment by the receiver enters as an element in the proposition of the Court of Appeals, the question is one of fact, not tried or found by the trial court, but simply assumed by the Court of Appeals to the detriment of the company.

But to come to the main question. Was the company, the surety, responsible for misconduct on the part of O'Brien in the employ of the receiver? If not, the contract of suretyship had expired. It is said by the court he was not dismissed, nor did he retire on the 12th of November. Perhaps not on that day, but when the

receiver took possession of the suspended bank and dispossessed the officers and employees, there was dismissal and retirement in the strictest sense of those words. Besides, the contract means substantially the termination of the relation of master and servant, of which death, dismissal, and retirement are examples.

Could the officers and employees have sued for and recovered their salaries for any period after dispossession? The court further says, "the bank did not cease to exist when the bank examiner took charge of its affairs on November 12, nor when the receiver qualified and took possession." If this be conceded, still the bank had no functions, and hence no service for such exercise. All persons employed by the receiver were in his service, contracted with and paid by him, and for whom he was responsible, and their employment by him no more made them the servants of the bank than of the creditors or stockholders. Certainly the question whether the relation of O'Brien as employee of the bank terminated was one of fact to be tried by the jury. The burden of proof was upon the receiver.

The powers and duties of the receiver as declared by law (R. S., U. S., § 5234) necessarily included the power to employ clerks and other servants.

Again, the contract evidently contemplates that the appointment of O'Brien to other duties than those of cashier shall be made by the bank, and not otherwise. Not only were the other duties to be "in the service of the employer," but the appointment to discharge such duties was to be made by the employer. A construction is not to be put upon a contract of guaranty beyond the contemplation of parties and its plain terms. Here is a contract by which the duty of the guarantor was expressly made upon the condition of other correlative duties to be performed by

the employer and involving judgment and discretion. *Non constat* that a guarantor would be willing to accept the judgment and discretion of any party other than the bank. Certainly the terms of the contract indicate no such willingness, but are confined strictly to the employer.

In the case of *Barker v. Parker*, 7 D. & E. 287, the condition of a bond was that a clerk should serve faithfully and account for all moneys to the obligee and *his executors*. After the death of the obligee, the business was carried on by the executors. Lord Mansfield held that the surety was not liable for moneys received after the death of the obligee, although he was continued in the same employment by the obligee's executors. *No service except to the obligee was contemplated, although it might have been necessary to account to his executors.*

See also 2 Brandt on Suretyship and Guaranty, 2d ed., § 119.

POINT VI.

THE BUSINESS ENGAGEMENTS OF THE RECEIVER COULD NOT JUSTIFY DELAY IN SERVING THE NOTICE OF CLAIM, AND THE CHARGE OF THE COURT ON THIS POINT WAS ERROR.

The court charged the jury: "Now this notice (of claim) was given, the only way it could be given practically, by mail on the 24th of June, and received by the defendant on the 1st of July. Now, if it is a fact that the plaintiff was engaged more or less in consultation with the United States attorney, and with the criminal authorities, and that his circumstances and situation were such that it

could not be reasonably expected of him that he should make out this formal claim and send it before the time when he did so, then you can find the notice was given within a reasonable time and in compliance with the condition of the policy." (R. 190, 191 ; exception R. 197.)

The plaintiff testifies that it may have been two months after he became aware that there were irregularities in Collins's account, and that the bank had suffered loss from his defalcation, before he made it known to the company ; that he waited two months because of the extensive business he had on hand, and the many matters that were calling for attention every day ; that he had to carry on consultations concerning these losses with his attorney ; and that he had to consult with the United States attorney at Los Angeles, requiring visits in person, besides correspondence. (R. 138.) (The receiver evidently refers, when he speaks of the delay of two months, to the letter of May 23d. As a matter of fact he delayed until the 24th of June.)

Suppose the receiver discovered the loss for which the company was responsible in January and sent the notice of claim in June, no one would contend that under ordinary circumstances, the notice was sent, as soon as practicable, after the discovery of the loss. *But*, says the court, if his engagements, circumstances, and situation were such that it could not be reasonably expected of him to make out the notice and send it before June, then the jury can find that the notice was given in compliance with the bond.

The company was entitled to receive the notice as soon as practicable after the loss. The engagements, circumstances, and situation of the receiver could not extend the time for a single day. Under the charge the receiver could have delayed serving the notice for an indefinite

period, *provided* his engagements, situation, and circumstances were such that it could not be reasonably expected of him to serve it sooner. This was clearly error.

POINT VII.

ERRORS WERE COMMITTED IN THE ADMISSION OF EVIDENCE.

We cannot undertake to argue in detail the questions of evidence presented by the record. There are, indeed, but few that space will permit us even to notice :

1. The admission in evidence of Collins's ledger account, and of the teller's book, as it was called.
2. The admission of evidence as to alleged prior frauds.
3. The admission of evidence claimed to show the extent of Collins's indebtedness to the bank.

These errors are so fundamental, and, as it seems to us, so plain, that we call especial attention to them :

1. *The ledger account and the teller's book.*

Keeping in mind the theory of plaintiff's case, that O'Brien permitted fraudulent *credits* in Collins's account, and then permitted him to draw out the moneys, we ask how *the entire account* could be competent evidence against this surety.

It certainly could not of itself be evidence of anything. It does not prove itself. It is but a series of declarations by which the surety cannot be affected, much less bound. It would not be evidence even against O'Brien.

Rudd *v.* Robinson, 126 N. Y. 117.

Smith *v.* Rentz, 131 N. Y. 175-6.

And it could not be evidence against the surety, even if all the entries had been in O'Brien's own handwriting. It would then be simply his admissions, not binding on his surety.

Hatch v. Elkins, 65 N. Y. 489.

Roe v. Beach, 76 N. Y. 168.

If not evidence, in and of itself, it never was made evidence by any further testimony. The rule requires entries to be proved by the person making them and having personal knowledge of the facts asserted by them. No rule is better settled than this; but no such testimony was given. The only witness put on the stand as to the ledger account testified that he had no personal knowledge of the transactions represented by the entries, and did not even make all the entries. But, in spite of our objections, he was allowed to read from the account as much as plaintiff desired (R. 51), and this account was *the only evidence* that Collins *ever drew out anything*. We submit that it was wholly insufficient.

The same considerations apply to the teller's book. (R. 59-61.)

Admitting, however, that the books were evidence as against the Surety Company, if properly proved, the testimony was to the effect that the books did not contain a true account of the transactions of Collins with the bank. Brimball, the bookkeeper, testified that the account of Collins was used as a "clearing house" (R. 68); that his account was used for many transactions of the bank in which he had no interest (R. 69); that his account contained items not properly chargeable against him (R. 69); that his account was used for the purpose of getting a transaction off the books which had been placed there

for the convenience of the bank (R. 69); that there were transactions in Collins's name for the benefit of the bank (R. 70); that to pass things into his account and out of his account that were really for the interest of the bank, and not Collins's, was an every-day transaction. (R. 68.)

Not only this, but after the suspension certain additional items were entered in the account. (R. 51-166.)

Indeed, in the plaintiff's own case the account must have been discredited, for the account shows (R. 281) and the bookkeeper testified (R. 51) that at the suspension of the bank Collins had a credit of \$11,420.90. It is only on the theory of Collins' indebtedness to the bank that it is made to appear that Collins drew out the \$45,000 improperly placed to his credit. Moreover, if we take the two bonds together, one in this case for \$15,000 and one in the Collins case, No. 169, for \$25,000, making \$40,000 in all, and deduct from the alleged loss, \$45,000, the credit in favor of Collins for \$11,420.90, we have as a result \$33,679.10, while the plaintiff sued for and recovered a judgment for the full amount of both bonds. It was only by discrediting the account that the plaintiff maintained his case. That is why he notified the company that Collins' account was overdrawn to the extent of \$374,978.22. (R. 238, 247, 275.)

2. *Evidence as to alleged prior frauds.*

Mention has been already made that plaintiff was allowed to prove alleged frauds prior to the date of our bond. There were many instances of this, one or two examples of which will be sufficient. On March 25, 1891, the Park Bank of New York loaned \$25,000; and on June 10, 1891, \$20,000 to the California Bank. (R. 75-77.) These sums, it is claimed, were by deposit tags credited to Collins. (R. 74, 213.) Even conceding that, for ar-

gument's sake, how could it properly affect the surety? Our bond was not given until July 1, 1891. (R. 11.) The urgency for it all is apparent. By the books of the bank—this very ledger account—Collins still had \$11,420.90 to his credit when the bank closed its doors. To make out his case it was necessary for the receiver to strike out some of the credits, thus impeaching the account, and at the same time to insist that *the entries on the other side* were *per se* evidence, even against the surety, of Collins having drawn out money.

Now, we submit that all this was error. If these items are *not* necessary in proving that *during the life of our bond* Collins was allowed to draw out more money than was his right, then, however fraudulent it may have been, it was improper to admit it to our prejudice with the jury.

If they *were* necessary to the establishment of any loss, then the loss was one for which the surety was not liable. We did not undertake to answer for O'Brien's acts done before the bond was given.

Still further, even if we could in any way be *liable* under the bond for these alleged prior frauds, then we were *entitled*, under the bond, *to have them specified in the proof of loss*. This was not done. All these objections were taken (R. 74, 75, 76), and the admission of the evidence *was*, we submit, error.

3. *The extent of Collins's indebtedness to the bank.*

The error in this was twofold.

(a) Its amount had no legitimate bearing on the case.

The surety was only liable for "fraud and dishonesty," not for "indebtedness." The charge was "false entries," and improper certificates of deposit. If, on any particular day, Collins gave value to the bank, he was *entitled* to a

credit to that amount or to a certificate of deposit, as he might elect, *no matter how much he then owed the bank.* The bank could not take his money save on his own terms. The only question, then, under the proof of loss, the complaint, or the bill of particulars, was whether he did or did not give value in the case of the particular items on which a recovery was sought. His general indebtedness had nothing legitimately to do with that inquiry. Yet it was put to the jury as having *great importance.* (R. 64-65, 184), and had great effect on their minds. (R. 194.)

Still further, it nowhere appears that *O'Brien* had anything to do with the creation of this indebtedness. We do not now speak of any charge of "false credits," &c., but merely of the alleged general indebtedness of Collins to the bank. On the contrary, as already seen, *O'Brien* had in reality no power or control as to the bank's affairs. When the directors leave Collins to "run the bank," from first to last, during his connection with it in any capacity, and, on his elevation to the presidency, put in as cashier a former stenographer and collection clerk, understanding, as they all say, that he was still to be merely a "clerk" to Collins, how can "the general state" (R. 65) of Collins's indebtedness to the bank be evidence legitimately proving "fraud and dishonesty" on *O'Brien's* part; *a fortiori* how can it legitimately bear on the question whether *O'Brien* gave *certain credits* and issued *certain certificates of deposit* without the bank's receiving any value for them?

(b) There was no competent evidence showing how much Collins did owe the bank, and incompetent evidence on that subject was admitted. The receiver claimed to have sent to the surety a certain account showing the true

condition of affairs between Collins and the bank. It was at last received in evidence. (R. 128, 247-275.) It makes out Collins a debtor in \$374,978.22. This was what the juror had in mind. (R. 194.) There was a great struggle over its admission, the surety insisting that there was no proof of its having ever been sent to him. But conceding, for argument's sake, that this was proved, what of it? How did sending it to the surety make it competent evidence against the latter, that Collins owed the bank \$374,978.22? The receiver relied on a phrase in the bond as to "*prima facie* evidence." (R. 13.) That clearly refers to a prior part of the bond, which says that the notice must be accompanied by "satisfactory proof of a loss, as hereinafter mentioned." (R. 12.) The bond, therefore, proceeds, later on, as promised, to say in what form this *preliminary* proof must be. The parties are not speaking of a possible subsequent trial of an action. No such contingency is in their minds.

Moreover, the statement which is to be "*prima facie* evidence" is a statement of the "loss," for which claim is made. It is not pretended that the receiver could, or ever did, claim \$374,978.22 under the bond. This is a statement of Collins's alleged aggregate indebtedness to the bank, and not of the "loss" claimed from the surety. How, then, can it be evidence against the latter?

Lastly, the statement must be "based upon the accounts of the employer" (R. 12), and that cannot be said of the statements received in evidence. Allen, the United States district attorney; Sparks, the expert, and Bloodgood, his assistant, investigated Collins's transactions, then took his account on the books and remodelled it to suit their own notions of what it should be. Collins was dead at the time (R. 168), and no one, so far as appears, represented his interests. It was a purely *ex parte* proceeding, in

which the three actors assumed what "facts" they pleased (R. 166), and rendered what judgment they saw fit. (R. 166.) Specimens of the way the work was done appear in the record. (R. 167, 169.) The latter of these two items was not claimed from the surety; the former was and was thrown out by the court, despite the learned and lucid reasoning of the California U. S. district attorney, on which this committee of three acted.

Surely it is idle to stop to argue that this remarkable document was not evidence against the surety, that Collins owed the bank \$374,978.22, even if—which we have already disputed—that fact, legitimately proved, would have been competent. The surety did not agree that a statement of such composite parentage—not merely not "based" upon the employer's account, but assuming upon outside investigations to impeach them—should be evidence of anything against him.

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

W. D. DAVIDGE,
HENRY C. WILLCOX,
W. D. DAVIDGE, JR.,
For Plaintiff in Error.



No. 168.

DEC 15 1897
JAMES H. MCKENNEY
CLERK

Brief of Paige for D. C.
Supreme Court of the United States,

NUMBER 168 OF OCTOBER TERM, 1897.

Filed Dec. 15, 1897.

AMERICAN SURETY COMPANY,

Plaintiff in Error,

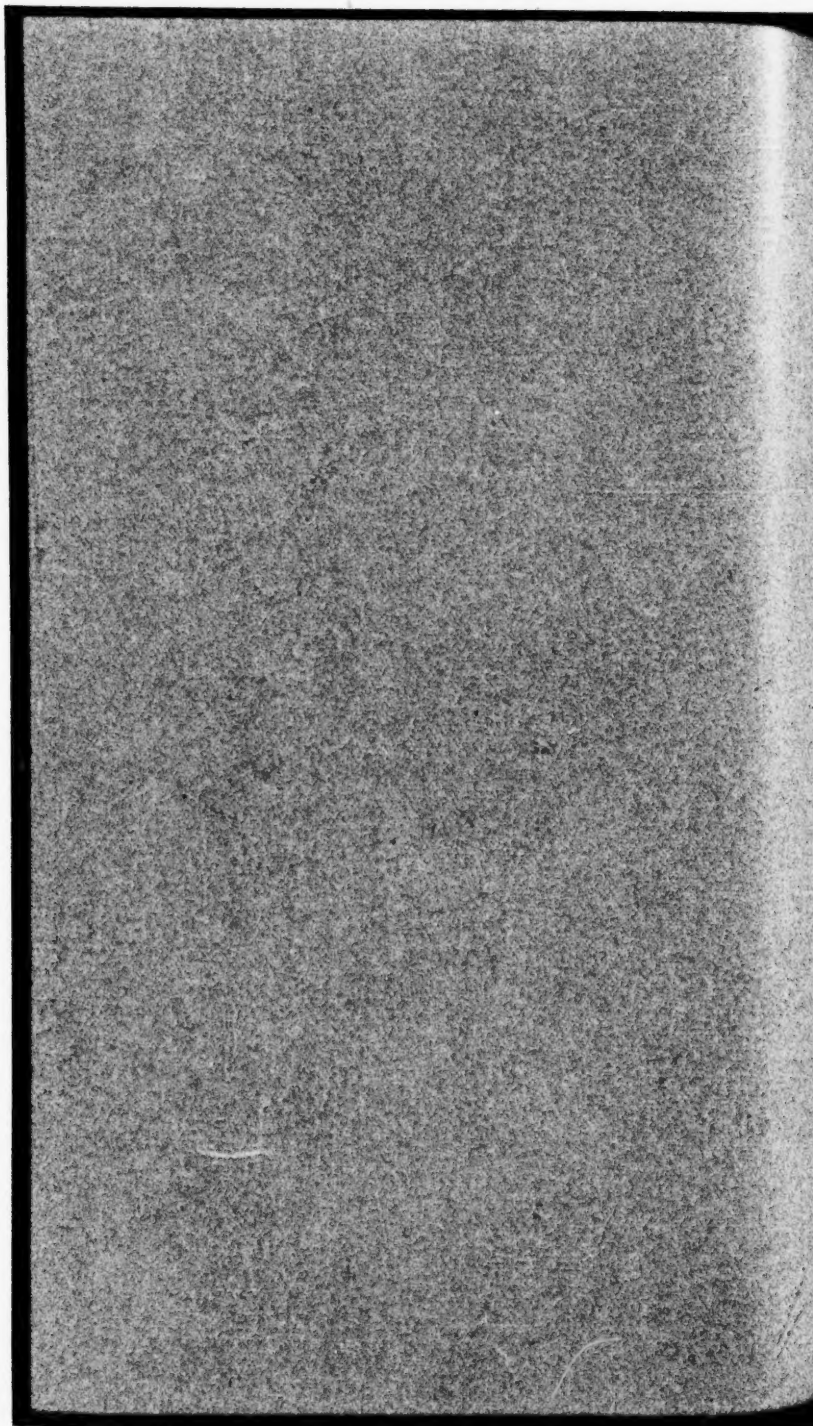
against

FREDERICK N. PAULY,

Defendant in Error.

O'BRIEN CASE.

Brief for Defendant in Error.



IN THE
Supreme Court of the United States.

NUMBER 168 OF OCTOBER TERM, 1897.

AMERICAN SURETY COMPANY,
Plaintiff in Error.

against

FREDERICK N. PAULY,
Defendant in Error.

O'Brien Case.

BRIEF FOR DEFENDANT IN ERROR.

Abstract or Statement of the Case.

FIRST HEAD: *Condition and Nature of the Action.*

Writ of error to the Circuit Court of Appeals for the Second Circuit, bringing up a judgment of that Court which affirmed a judgment of the Circuit Court for the Southern District of New York—a judgment for money entered upon a verdict of a jury, which had been rendered in the favor of the plaintiff below.

The action was brought upon a paper writing under seal, called therein a "Bond," made by the plaintiff in error, by which it bound itself to "make good and reimburse to the" California National Bank, "all and any pecuniary loss sus-

tained by" it, "of moneys, securities, or other
 "personal property in the possession of" one
 George N. O'Brien, its cashier, "or for the posses-
 "sion of which he is responsible, by any act of
 "fraud, or dishonesty, on " his "part, in connec-
 "tion with the duties of the office or position here-
 "inbefore referred to," * * * * and "occur-
 "ring during the continuance of this Bond, and
 "discovered during said continuance, or within
 "six months thereafter, and within six months
 "from the death or dismissal, or retirement of,"
 said O'Brien "from the service of the " employer.
 The paper writing also contained the following:
 "It being understood that a written statement of
 "such loss, certified by the duly authorized officer
 "or representative of the Employer, and based
 "upon the accounts of the Employer, shall be
 "prima facie evidence thereof " (fols. 29-30).

Also the following:

"That the company shall be notified in writing
 "at its office, in the City of New York, of any act
 "on the part of the Employee, which may involve
 "a loss for which the Company is responsible here-
 "under, as soon as practicable after the occurrence
 "of such act shall have come to the knowledge of
 "the Employer. That any claim made in respect
 "of this Bond shall be in writing, addressed to the
 "Company, as aforesaid, as soon as practicable
 "after the discovery of any loss for which the
 "Company is responsible hereunder, and within six
 "months after the expiration or cancellation of
 "this Bond, as aforesaid " (fols. 32-3).

It was also provided in this paper writing, that
 its term should be for twelve months, ending on the
 first day of July, 1892, at noon (fol. 29), and that

the plaintiff in error should not be responsible under it to a greater amount than fifteen thousand dollars (fol. 34).

The defendant in error is receiver of the concerns of the California National Bank.

An issue made by a complaint which alleged loss from acts of O'Brien insured against as above and an answer denying the same, was tried to a jury which rendered a verdict in favor of the defendant in error for fifteen thousand dollars, with interest from three months after notice had been given.

The judgment entered upon that verdict was affirmed by the Court of Appeals for the Second Circuit, and the judgment of the latter Court is now brought here.

SECOND HEAD: *The Proofs.*

The 66th, 71st and 72d assignments of error are that at the close of the plaintiff's case, the Judge erroneously denied a motion to dismiss the complaint, and that at the close of the testimony the Judge erroneously denied a motion to dismiss the complaint and a motion to direct a verdict for the defendant (fols. 872, 875).

These motions were made on the grounds that no acts of fraud or dishonesty on the part of O'Brien had been proved; that the plaintiff had not shown that the alleged loss was discovered within the continuance of the bond or within six months thereafter, nor within six months from the death, dismissal or retirement of the employee; and that the defendant was not notified as soon as practicable (fols. 389-91, 513).

As to the acts of dishonesty and the loss.

On the morning of the thirteenth of October, 1891, one John W. Collins, then and for a long time before president of the bank, owed the bank about three hundred thousand dollars—to be exact, \$301,728.22.

This is got at from the proof as follows :

His indebtedness on the twelfth of November was	\$314,978.22 (fols. 313, 319).
Less credits of 13 and 14 October . . .	\$45,000
(fol. 314)	
Less other credits to 10 November . . .	\$28 250— 73,250.00
(fol. 335)	
	<hr/> \$301 728.22

The Court should be informed that there are misprints in the dates of the two accounts printed on pages 247 to 281. On page 251 the date "1893" should be 1891. On pages 252, 253, 254, 255, 256 and 257 the six dates "1890" should be each 1889. On page 258 the first date "1890" should be 1889. In other words, the account should run consecutively from 19 Jan., 1888, at page 247 to 10 November, 1891, at page 275. On the other account, on page 277 the "1892" should be "February," and the "1893" should be "March." On page 278 the "1893" should be "March," and the 1895 should be "May." On page 279 the "1886" should be June and the "1887" should be 1891. On pages 280 and 281 the two dates "1887" should each be 1891. In other words the account should run consecutively from the first of November, 1890, on page 276, to January, 1892, on page 281. The mistake in the Collins account has come from the fact that the months are numbered in the original "2" for February "3" for March, and so on, and the printer has prefixed "189," "March," "1893," and so on. All this appears by a glance at the original bill of exceptions.

This indebtedness consisted of (fols. 628, 629) :

1. Notes.....	\$57,697.37
2. Cheques not charged.....	75,616.25
	<hr/>
	\$133,313.62

and the balance, mostly by the crediting to Collins' private deposit account in the bank of moneys borrowed by the bank elsewhere, and *its* property, not *his*, under circumstances similar to those now to be narrated.

On the 12th of October, 1891, Collins, in New York, borrowed for the California National Bank of the Western National Bank, on paper of the

California Bank, \$20,000, and that amount was placed to the credit of the California National Bank in its deposit account in the Western National, and was afterwards chequed out by the California Bank (fols. 226-229, 645-648). On the 13th of October, O'Brien made out a deposit slip to credit Collins \$20,000, stating on the slip to be "Western Nat." (fols. 169, 606), the slip being in O'Brien's handwriting (fol. 169). From this deposit slip, or "tag," as he called it, the book-keeper posted into the ledger to Collins' credit in the latter's individual account the same amount of \$20,000 (fols. 171, 155, 834), the ledger itself containing the words "W'stn Natl." opposite the credit of \$20,000 (fols. 834, 155). A telegram in cipher had previously on that day passed from Collins in New York to O'Brien in San Diego, which the court, on the objection of the defendant, ruled out (fols. 497-8).

On the 12th and 13th days of October Collins, in New York, borrowed for the California National Bank of the United States National Bank in New York, first, \$7,595.27, on two rediscounted bills, which the California National Bank had discounted; and, secondly, \$17,316.25 on the note of the California National with six of the latter's discounted bills as collateral. The total proceeds, \$24,911.52, were placed to the credit of the California National in its deposit account in the United States National, and were afterwards chequed out by the former (fols. 237-241, 669). On the 13th of October, O'Brien made out a deposit slip to the credit of Collins for \$24,500, writing on it "U. S. Nat., N. Y.," and on the 14th another for \$500, writing on that, "more U. S. Nat.," and those

amounts were posted to Collins' credit in the latter's individual account in the California Bank, there being written right out in the ledger opposite the larger of the two items the words, "U. S. Nat., N. Y.," and both deposit slips being in O'Brien's handwriting (fols. 605, 607, 155, 166-171, 834). There were telegrams in cipher referring to each of these from Collins to O'Brien on those days, which were ruled out by the Court on the objection of the defendant (fol. 497).

The above were the "acts of fraud or dishonesty" on the part of O'Brien which the court submitted to the jury. The plaintiff's claim was that O'Brien had deliberately put forty-five thousand dollars of the bank's money to Collins' credit, falsely writing upon the deposit slips that the money had come to Collins from the two New York banks.

As bearing upon O'Brien's knowledge, the plaintiff put in the general ledger (fol. 208, not printed) which showed the credits of the same amounts at the same times to the California Bank in its accounts with the two New York banks, and also evidence of the following transactions:

On the second of May, 1891, forty thousand dollars were put to Collins' credit by simply making an "item"—that is, putting a piece of paper in the cash (fols. 216, 499-505). The deposit slip in this instance is in the handwriting of Harry E. O'Brien (fol. 216), the brother of the cashier; a clerk in the bank and, of course, subject to the cashier's orders.

On the twenty-fifth of May, 1891, O'Brien made out to Collins three certificates of deposit—one for \$10,000 and two for \$7,500 each (fols. 675-679),

and took Collins' cheque therefor (fol. 625), which cheque he did not charge to Collins' account (fols. 181-3). Collins used these certificates as collateral to effect a loan to the same amount, \$25,000, from one Wood in Denver (fols. 244-252). The draft in which the proceeds were given to him he used in the Denver National Bank; \$5,115.25 of it to pay a debt of his own, and the balance of \$19,883.75 he put to the credit of the California National there (fols. 255-6). The above cheque (Exhibit Q) stands therefore for an indebtedness of \$5,115.25 only.

On the sixth of June, 1891, O'Brien put to the credit of Collins in the California National \$20,000, writing on the deposit slip, "By Teleg., Nat. Park Bk." (fol. 633), and this amount was posted to the credit of Collins in his individual account in the ledger (fols. 829, 216). On the third of June Collins had effected a loan of that amount from the Park Bank to the California National upon a note of the latter bank (fol. 637), the proceeds of which had been placed to the credit of the bank in the Park Bank (fols. 222-4), and the California Bank drew out the money.

On the twentieth of July, 1891, O'Brien gave Collins a certificate of deposit for \$20,000 and took Collins' cheque therefor, which he never charged up against the latter (fols. 626, 185).

On the sixteenth of September, 1891, he gave Collins a certificate of deposit for \$15,000 and took Collins' cheque therefor, which he never charged up against the latter (fols. 627, 185).

On the twenty-second of September, 1891, he gave Collins two certificates of deposit for \$7,500 and \$8,500, for which Collins gave his cheque,

which was never charged up against him (fols. 622-4, 180, 616-21).

Here were on the morning of the twelfth of October sixty thousand dollars of false deposits and seventy-six thousand dollars of certificates of deposit, issued for nothing:

23 May.....	\$10,000
" "	7,500
" "	7,500
20 July.....	20,000
16 Sept.....	15,000
22 Sept.....	7,500
" "	8,500
<hr/>	
	\$76,000

which we know of.

Here is a deliberate giving to Collins of one hundred and thirty-six thousand dollars of the bank's money, embracing nine false transactions, all but one of which were done by O'Brien himself.

And it may be, that had the other deposit slips used upon the trial (Exhibit Y, fol. 634) been printed, other false deposits would appear.

No denial was made. O'Brien was called by the plaintiff, but declined to testify on the ground that it might tend to criminate himself; the defendant's counsel being present and assisting (fols. 140, 142).

In addition to the above there are the transactions of the thirteenth and fourteenth October—\$45,000—on which the court sent us to the jury, and on the 31st October O'Brien put to Collins' credit \$20,000, writing on the deposit

" Check 1st Chic.....	\$10,000
" West Nat.....	10,000
<hr/>	
	20,000 "

(fol. 608), and charged those two banks correspond-

ing amounts (fol. 319); this was purely imaginary (fols. 227, 272).

Collins drew out all of this money—the balance to his credit in his deposit account being on the eleventh November, when the bank closed, \$10,-420.90 (fol. 835).

There is no doubt about this proof. Mr. Pauly, as early as the eighteenth of July, 1892, sent to the plaintiff in error a detailed account showing that Collins owed the bank when it closed \$374,-978.22 in his own name (fols. 709, 723), and claiming also that under the name of Dare and Collins he further owed the bank \$348,703.52 (fol. 709). The expert Bloodgood swore to the fact (fol. 313). The plaintiff in error sent an expert accountant to San Diego in July, 1893, and August, 1894 (fol. 509). He was given full access to all the books (fol. 509). They put him upon the stand and he did not question one word of the foregoing (fol. 510.)

II.—*As to the Discovery, Notice and Claim.*

The assets of the bank were taken possession of by the bank examiner on the thirteenth of November, 1891. Mr. Pauly took possession as receiver on the twenty-ninth of December, 1891 (fol. 411). O'Brien continued right along at the bank (fol. 411) until the first of March, 1892, when, on applying to Mr. Pauly for his salary for that month, he was told that it would be kept to be applied upon his (O'Brien's) indebtedness to the bank (fols. 311-312).

O'Brien's deposit account was overdrawn.

O'Brien thereupon left.

The receiver notified the plaintiff of acts of fraud

and dishonesty on the part of O'Brien on the twenty-third of May, 1892.

Mr. Pauly says that his discovery was made by the report to him of an expert by the name of Sparks. Sparks was employed by him on the first of April, 1892—not before—(fols. 285-6), and continued until the first of June.

Mr. Bloodgood assisted him (fols. 285-6).

Some days before the twenty-third of May they discovered the acts of O'Brien of the thirteenth and fourteenth of October, as already given, and made a written report about them to Mr. Pauly (fols. 285-8).

He thereupon on the twenty-third of May wrote to the plaintiff in error that "a discovery of fraud had been made of a sufficient amount to require the payment of the" amount of the bond, and asking for a blank to prepare the claim (fol. 689). To this the plaintiff in error responded by the letter which is printed at folio 691—sending the blank. This letter was received by Mr. Pauly about the eighth or ninth of June. On the twenty-fourth of June Mr. Pauly sent the letter printed at folio 695, enclosing the claim (fol. 596), and the notice (fol. 698). This was received by the plaintiff in error, and on the eighth of July it wrote to Mr. Pauly, acknowledging its receipt, not objecting to the proof of claim at all, but asking for full information as to the shortages and credits of both Collins and O'Brien (fol. 706). To this, on the eighteenth July, Mr. Pauly responded, by sending the Collins account, given at folios 733-819 (fol. 708). Correspondence followed between the parties, continuing until the fourth of October (fols. 708-732), mainly relating to the going of an expert, whom the Surety

Company intended to send to examine into the matters, and giving excuses why his going had been delayed. He had to go elsewhere upon its other matters, and had not got there as late as the fourth of October.

Mr. Pauly is uncertain in his memory as to the time of his discovery, and will not say but what it may have been as early as March or February, or even January, but to this one thing he always sticks—that the discovery was made by him, by its being communicated to him by the expert Sparks (fols. 404, 405, 417, 453, 484).

Now, we know that he did not employ Sparks until the first of April, and that Sparks was in his employ until the first of June (fols. 285-6). The payments to Sparks show this beyond question. We also know that the report of Sparks, in which Bloodgood joined, was not made to Mr. Pauly until a very few days before the twenty-third of May (fols. 285-8).

III—*As to Collins' certificate to O'Brien's honesty.*

The defendant put in evidence the following paper, made before the policy was given (fol. 948):

“EMPLOYER'S CERTIFICATE.

“I have read the foregoing declarations and answers made by George N. O'Brien and believe them to be true.

“He has been in the employ of this Bank during three (3) years; and to the best of my knowledge has always performed his duties in a faithful and satisfactory manner.

“ His accounts were last examined on the 28th
 “ day of March, 1891, and found correct in every
 “ respect. He is not to my knowledge, at present,
 “ in arrears or in default.

“ I know nothing of his habits or antecedents
 “ affecting his title to general confidence, or why
 “ the bond he applies for should not be granted to
 “ him.

“ Amount required \$15,000.00. Bond to date
 “ from July 1, 1891.

“ Dated at San Diego, the 10th day of July, 1891.

“ J. W. COLLINS,

“ Pt. Cal. Nat. Bk.,

“ On behalf of.....”

At the close of the evidence it made a motion for
 the direction of a verdict in the following words
 (fol. 513):

“ Defendant’s counsel moves to dismiss the com-
 “ plaint, or for the direction of a verdict * * *
 “ upon the ground of misrepresentation in the
 “ application for this bond—misrepresentation by
 “ Mr. O’Brien and by Mr. Collins, and misrep-
 “ sentation by the bank itself acting through Mr.
 “ Collins.”

It also made to the court the following requests
 to charge (fols. 533-535):

“ 33d. If the jury find upon the evidence that
 “ Collins acted for the bank in procuring the bond
 “ sued on, and that before procuring this bond he
 “ had been guilty of dishonest and fraudulent
 “ conduct in connection with his duties as presi-
 “ dent, and that this fact was known to O’Brien,
 “ but was concealed from the surety company,
 “ then there can be no recovery in this action.

“ 34th. If the jury find that at the time of making application for or receiving the bond in suit any person acting for the bank represented to the surety company that the accounts of the cashier O'Brien had been examined, and had been found to be correct, and the surety company relied upon such representations when in truth those accounts showed that prior to this time Collins had been guilty of dishonest and fraudulent conduct in his connection with his duties as president of the bank, then there can be no recovery in this action.

“ 35th. If the jury find that at the time of making application for the bond in suit any person acting for the bank falsely and fraudulently, and with knowledge to the contrary, represented to the surety company that the accounts of the cashier O'Brien had been examined and had been found to be correct, when in truth those accounts showed that prior to this time Collins had been guilty of dishonest and fraudulent conduct in connection with his duties as president of the bank, then there can be no recovery in this action.

“ 36th. If the jury find upon the evidence that the bond in suit was procured by concealment or misrepresentation of any facts showing prior dishonest or fraudulent conduct on the part of O'Brien, then the plaintiff cannot recover, no matter who was guilty of such concealment or misrepresentation. The bank cannot now enforce the bond without being affected by the consequences of such concealment or misrepresentation.”

The court, upon this matter, made the following charge :

(Fols. 566-8.) "A defense has been interposed to which I must call your attention. It is said that this bond of indemnity was obtained upon an application which was certified to by the bank itself, and that in the application facts were misrepresented and facts were concealed—with fraudulent intent on the part of the bank; therefore that the bond is void. The application was accompanied by a certificate of Collins, the president of the bank. The only knowledge of any facts which ought to have been communicated, or were misrepresented, the only knowledge which the bank possessed at the time that application was made was the knowledge of Collins himself. Ordinarily a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agents; but in this case all these transactions, if there were any transactions of a fraudulent and dishonest character on the part of the cashier, were transactions for the benefit of Collins, and he was a participator in the fraud, and under those circumstances the law does not infer that the agent or the officer will communicate the fact to his principal, the corporation, and under such circumstances the corporation is not bound by his knowledge. So this defense melts away and there is nothing of it whatever."

And to this the defendant took the following exceptions.

(Fol. 581.) "Mr. Strong: And lastly, your Honor's instructions, that because Mr. Collins was the offender, if there were any offender, therefore his knowledge did not bind the bank.

"The Court: You are entitled to an exception."

(Fol. 584.) "The defendant's requests are denied, except as covered by the charge.

"Mr. Strong: The defendant excepts separately to each one."

The following points are in the order of those made in the brief which the plaintiff in error used in the court below, and are an attempt to answer that brief.

BRIEF OF THE ARGUMENT.

I.

The motion for the non-suit was properly denied.

The contrary of this proposition, as contained in the brief which the plaintiff in error used in the court below embraced three distinct matters:

1. That Mr. Pauly did not give notice of the acts of O'Brien soon enough after the discovery of them.

2. That he did not make his claim soon enough after that discovery.

3. That he did not make the discovery within six months after O'Brien's "retirement" from his employment.

The first two matters will be considered together, since the notice and the claim were given and made together—1 and 2. The provision in the con-

tract is in these words (fol. 33): " That the Company shall be notified in writing, at its office in the City of New York, of any act on the part of the Employee, which may involve a loss for which the Company is responsible hereunder, *as soon as practicable* after the occurrence of such act shall have come to the *knowledge* of the Employer. That any claim made in respect of this bond shall be in writing, addressed to the Company, as aforesaid, *as soon as practicable* after *the discovery of any loss* for which the Company is responsible hereunder."

What is "as soon as practicable" is a question of fact.

Angell, §§ 231, 233.

Insurance Co. *vs.* Stark, 6 Cranch, 273.

Cashau *vs.* N. W. Nat. Ins. Co., 5 Biss., 476.

O'Brien *vs.* Phoenix Ins. Co., 76 N. Y., 459.

Carpenter *vs.* G. A. Ins. Co., 135 N. Y., 389.

McNally *vs.* P. Ins. Co., 137 N. Y., 389.

Edwards *vs.* Baltimore Fire Ins. Co., 3 Gill, 176, 188.

People's Accident Assn. *vs.* Smith, 126 Penn. St., 317, 325.

In *Cashau vs. Northwestern Nat. Ins. Co.*, 5 Biss., 476, the contract was of reinsurance, and contained the following: " All persons having a claim under this policy shall proceed at once to put the property in the best order, and give immediate notice, and render a particular account

“thereof in writing, under oath, stating the time, origin and circumstances of the fire.”

The fire occurred 9th October, 1871. The insuring company was made insolvent by the fire and a receiver was appointed and qualified 16th October, 1871. Proofs of loss were made by insured and served on the receiver 8th December, 1871.

On the 29th December, 1871, the receiver gave notice to the defendant that proofs of loss had been served upon him by the insured, and that he would hold the defendant liable. This was served on the president of defendant 29th December, 1871, and acknowledged by the secretary 4th January, 1872. On the 22d January, 1872, proofs of loss were served by the receiver on the defendant.

In a suit by an assignee of the receiver, the court directed a verdict for plaintiff. On a motion for a new trial Mr. justice *Miller* refused to disturb the verdict, saying: “The word *immediate* must mean a reasonable time under the circumstances.” (p. 478).

It thus appears that the fire occurred on the ninth of October, 1871, and no notice of any kind was given to the insurance company until the twenty-ninth of December—a period of two months and twenty days. There was no excuse, except that the receiver was new to the business. That excuse can be urged here with equal force.

In *O'Brien vs. Phoenix Insurance Co.*, 76 N. Y., 459, the loss occurred the eighth of March, and the proofs were furnished the sixteenth of May—two months and eight days.

In *Carpenter vs. G. A. Ins. Co.*, 135 N. Y., 298, the lapse of time was one hundred and fifteen days.

In *McNally vs. P. Ins. Co.*, 137 N. Y., 389, the policy provided that a certain certificate should be given "if required." The fire occurred seventh June, 1885. The certificate was "required" on the seventeenth of June, 1885. It was furnished seventh of June, 1886—ten days less than one year and the court did not disturb the verdict of the jury.

In *Brink vs. Hanover Fire Ins. Co.*, 80 N. Y., 108, the court held the following question to be proper: "Q. So far as you could individually did "you get those proofs of loss forwarded as soon as "it was possible for you to do so?" In that case the policy required the proofs to be forwarded as "soon as possible." The fire occurred on the twenty-third of November. The proofs were prepared by one of the plaintiffs and forwarded to the other on the seventh of the following January, and they were given by the latter to the insurance company on the seventh of February.

Evidence was as follows :

The bank examiner took possession of the assets of the bank on the twelfth of November, 1891, and Mr. Pauly qualified as receiver on the twenty-ninth of December, 1891. O'Brien continued right along at the bank until the first of March, 1892, and he then left, not because Mr. Pauly discharged him, but because when he then demanded his salary for the month Mr. Pauly told him that he must retain it to apply upon his (O'Brien's) acknowledged indebtedness to the bank. O'Brien then left. Here is evidence that Mr. Pauly knew nothing to the discredit of O'Brien as late as the first of March (fols. 411, 312-13).

Mr. Pauly testifies that he first acquired his knowledge of the acts of O'Brien which are in question, by being informed by the expert Sparks (fols. 404-5, 417, 453, 597-8). Sparks was first employed by Mr. Pauly on the first of April, 1892, and continued until the last of May (fols. 285-6). He was assisted by Bloodgood (fols. 285-6, 453). They "worked all the time constantly and worked hard" (fol. 286). They prepared a paper which described these acts and gave it to Mr. Pauly shortly before the twenty-third of May (fols. 287-8), and Mr. Pauly notified the defendant on the twenty-third of May.

Fol. 690, date of letter not printed, but stated in the answer to it (fol. 691) to be 23d May.

Bloodgood testifies that he had no idea that O'Brien had been guilty of any dishonesty or fraud until they found it out in May (fols. 355, 353, 357), and that they then first discovered the deposit tags made by O'Brien (fol. 287).

On this we claimed that the discovery by Mr. Pauly was made by him by means of this discovery of the experts and their written report to him (fols. 285-288).

Now, no matter how much evidence there may have been to the contrary of this, we had a right to go to the jury upon the difference in the testimony and the verdict has settled that issue in our favor.

Nor is the evidence to the contrary of any force—it is this. At the outset the bill of particulars was mistakenly made to state the discovery as of January and February, and, as the rules require, Mr. Pauly verified it. At the beginning of the trial this was amended. Still the defendant put it in evidence as the declaration of Mr. Pauly, and it is

much the strongest bit of evidence which it has got.

Then there are several statements by Mr. Pauly on cross-examination before trial. Not positive—but that *it may have been* as early as January or February. He will not say but what he knew of the acts for as much as two months before he notified the defendant, and such like. It is nothing stronger than saying that he does not remember. But in the same breath he always says that the way he made the discovery was by information from the expert Sparks—the result of the examination made by the latter.

Now, we know when and for how long Sparks was employed. Not from the uncertain recollections of human witnesses, but from the certain records of *when and for what time he was paid*. His employment was during the months of April and May.

Much stress is laid in the brief upon the facts that the Western National's claim was made to Mr. Pauly as early as the fifth of March, and that as early as the last of January Mr. Pauly made a report to the comptroller of the currency, in which he set out the notes given on the thirteenth October to the Western National and the United States National as outstanding liabilities of the California National. It is difficult to see what this has to do with the matter. The transactions between the California and the other two banks were perfectly honest ones; the former borrowed money, got it, and gave its notes for it, and the notes thus given became valid liabilities. Knowledge of these transactions does not imply knowledge that on the following day O'Brien put to the credit of Collins a

sum of money which did not belong to the latter. The only evidence of this which we now have, or which anybody ever did have, is the deposit tag. Without this it would simply appear that Collins deposited so much money on the thirteenth of October; *non constat* but it may have been gold. Here, so far, is no evidence nor suspicion of anything wrong. But the deposit tag shows that this deposit was not gold, but money in the two New York banks, and the transactions with the New York banks show that that money belonged to the bank and not to Collins. And this is the only relevancy of the transactions in New York. *They show that the statement on the deposit tag—which was made the basis of the credit—was false.*

The deposit tag is in O'Brien's handwriting, *and is the only bit of evidence which anybody ever had of O'Brien's complicity in these transactions.*

Now, the evidence is that the deposit tag was not found until May (fol. 287).

The statement in the brief which the plaintiff in error used below that a complaint was sworn out against O'Brien in February is a mistaken one. Mr. Pauly never gave any such testimony. He said a complaint was then sworn out against *Collins*, not *O'Brien* (fols. 422-3). Further he said that the complaint against O'Brien was made to *the Grand Jury* (fol. 423), and the Grand Jury did not sit until June (fol. 355).

The verdict of the jury has thus established the fact that the discovery was made by Mr. Pauly in May, and shortly before the twenty-third of May.

On the twenty-third of May Mr. Pauly wrote the letter which is printed at folio 690, informing the defendant that he has made a discovery of

fraud sufficient to require the payment of both the O'Brien and the Collins bonds, and asking for blanks to make the claims. To this the defendant replied on the thirty-first of May, sending the blanks (fol. 691). On the twenty-fourth of June Mr. Pauly sent the claim (fol. 596). This was received without any objection, and a correspondence ensued, which continued until October, and which on the part of the plaintiff in error consisted mostly of requests for further information, which was furnished as asked, and requests that Mr. Pauly should wait until their Mr. Bradbury Williams got there (see the correspondence, fols. 690-732).

Whether all this was "as soon as practicable" after the discovery of the loss was, as above shown, a question of fact, and the jury has determined it in our favor.

3. That the discovery was not made within six months after the "retirement" of O'Brien.

This is on the supposition that the "retirement" of O'Brien took place when the bank examiner took possession of the assets on the twelfth of November, 1891, and that the "discovery" did not take place until after the twelfth of May, 1892.

Neither supposition is correct. *The retirement.* The statement in the brief that the receiver had sworn that O'Brien ceased to act as cashier on the twelfth of November is incorrect. What Mr. Pauly swore to was that he dispossessed the officers and employees, but continued O'Brien "for a short time" (fol. 411). Now it is certain that this short time continued until the first of March, when O'Brien left of his own accord (fols. 312-13).

These are the facts. What is the legal consequence?

In the first place it is perfectly well settled that the appointment of a receiver neither dissolves a corporation nor puts an end to the terms of its officers.

Kincaid vs. Dwinelle, 59 N. Y., 548.

Suppose in this case the comptroller of the currency had restored the assets to the bank, as he actually intended and tried to do, would not O'Brien still have been cashier? He therefore continued to be cashier and acting until the first of March.

But *secondly*, the testimony relied on in the brief is that *Mr. Pauly*, not the bank examiner, dispossessed the officers (fol. 410). But Mr. Pauly did not take possession until 29 December (fol. 411). The 23d of May is thus within the six months.

And *in the next place*, let us suppose O'Brien ceased to be cashier on the twelfth of November. He still continued to be an employee of some kind and in some sort of capacity. But the bond is not limited to the time when he was cashier. It insures against his acts "in connection with the duties of "the office or position hereinbefore referred to" (cashier) "or the duties to which in the employer's "service he may be subsequently appointed" (fol. 30), and the "retirement" is not from his office of cashier, but it is the "retirement of the employee "from the service of the employer" (fol. 30).

The Discovery: Let us now suppose that the "retirement" did occur on the twelfth of November, and see how the case stands.

The testimony as to the discovery is that it was

made by the experts and communicated to Mr. Pauly "some time in May" (fol. 287)—"towards the end of May" (fol. 287). "It must have been prior to the 23d of May" (fol. 288). "We began the examination about the first of April, 1892, and completed it somewhere towards the end of May. We worked all the time constantly and worked hard" (fols. 285-6).

From this evidence the jury could find any day in May—the eleventh, for instance—as the date of the discovery, and if it be necessary to sustain the verdict, it has done so.

4. "It did not appear that the cashier had been guilty of any fraud or dishonesty."

The cashier, having received from Collins a telegram, the contents of which we do not know, put \$20,000 to Collins' credit, and in doing so made out a deposit ticket in which he impliedly said that Collins had got the money from the Western National Bank. The statement was false. *If* he knew it to be false, the act was fraud. Upon the issue of his knowledge we proved:

1. That Collins then owed the bank three hundred thousand dollars.
2. That the cashier, at the time, had the money charged to the Western National in the general ledger (fol. 208), but no credit made to any account. This should not have been the entry had the money been Collins' (fol. 318).
3. It appears by the printed evidence that he had done the same thing twice before. *How*

many other instances would appear had the plaintiff in error printed the parcel of deposit slips which is in the bill of exceptions (fol. 634) does not appear. In their absence, it is submitted that the Court will not disturb the verdict on this ground, even though it should think the printed evidence not sufficient.

Then there is the absence of all denial on the part of O'Brien and his refusal to testify on the ground that it would tend to criminate him (fol. 140).

It is submitted that there was enough to go to the jury upon the question of his knowledge and intent, and the jury has found that his intent was fraudulent.

5. *No actual loss was shown as to any loss alleged in the proof.*

The theory of this is that the policy requires the claim to state "a loss," and that the claim in this instance does not set forth any loss.

The claim states that O'Brien put to the credit of Collins the sum of forty-five thousand dollars "without the said Collins paying any consideration therefor to said bank, and without being entitled to said credits, as he, the said O'Brien, then and there well knew" (fol. 600). "That neither of the above sums, nor any part thereof, *have ever been returned or repaid to said bank*" (fol. 602).

The loss occurred when the money was taken from the credit of the bank and was put to the credit of Collins, and none of it was ever returned. And here is sufficient statement of a loss of forty-

five thousand dollars. But another paper accompanied this, in which the statement of the putting of the forty-five thousand dollars to the credit of O'Brien having been given in the same words, the paper proceeds: "That in pursuance of a certain
 "bond, numbered 85,565, heretofore issued by
 "your company, in which you agree to make good
 "and reimburse the said California National Bank
 "of San Diego all and any pecuniary loss sustained during the continuance of the bond on
 "account of the fraud or dishonesty of the said
 "G. N. O'Brien, after a written statement of said
 "loss is presented."

"This notice is given you as soon as practicable
 "after the occurrence of the wrongful acts herein-
 "before referred to, and demand is hereby made
 "upon you by the undersigned, as representative
 "of said bank and as such Receiver, for the sum of
 "fifteen thousand dollars (\$15,000), the amount in
 "said bond stipulated" (fols. 703-704). It further refers to the other paper, and calls it "a statement of a loss."

This paper would be good as a pleading; it sufficiently apprises the Surety Company that Mr. Pauly wanted fifteen thousand dollars, because of loss occasioned by O'Brien having put forty-five thousand dollars of the bank's money to the credit of Collins. Nobody in the world could possibly understand it in any other way.

But an entirely sufficient answer is that the company *retained* the proof of claim *without any objection*, all through a long correspondence, extending from the twenty-fourth of June, 1892, until the fourth of October, 1892, and consisting of six letters on the part of Mr. Pauly and five on

the part of the defendant (fols. 694-732). The substance of these is as follows:

On the eighth of July the defendant writes (fol. 706): "We are in receipt of your two letters of the 24th ultimo, transmitting two affidavits relative to the claim under the bonds of this company to the California National Bank for J. W. Collins and George N. O'Brien, in the respective positions of president and cashier of said bank. We have respectfully to request that you will make a statement of each on the claim forms which we use for that purpose, two of which are herewith enclosed."

Under date of the twenty-sixth of July, the defendant writes (fol. 716): "Yesterday afternoon we received your communication of the 18th instant, and its enclosures, *making formal claim* against this Company under bonds of the late J. W. Collins and G. N. O'Brien, formerly the President and Cashier respectively of the California National Bank, and for information in regard to the whole case we have referred copies of documents to our Inspector, Mr. Bradbury Williams, for investigation and report. You do not transmit to us a copy of your letter of the 20th June, addressed to Mr. George N. O'Brien, to which he replied on June 24th last as per copy transmitted by you.

"*Inquiry into this matter* cannot necessarily be completed for some time by reason of the peculiar situation of affairs, and also because of the enforced absence of Mr. Williams on other matters, which will delay him for some two weeks or more. Please give Mr. Williams all the information he desires, in order that full advices

“ may be transmitted to this Company at the earliest practicable date, so that we may pass intelligently on the claim in question.”

In his answer Mr. Pauly sent the letter to O'Brien (fol. 720), the receipt of which the defendant acknowledges (fol. 721).

The rest of the correspondence mainly relates to explaining the delay of Mr. Bradbury Williams, who had not got to San Diego on the fourth of October—some ten weeks—and in fact never did get there at all.

The criticism with which we are now concerned was first raised upon the trial *more than two years later*.

It is not even in the answer.

From all this the jury could have found a waiver of this defect, if it be a defect, and, of course, has done so.

Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S., 527, 546.

People Fire Ins. Co. v. Pulver, 127 Ill., 246, 249.

and the cases collected by Mr. May, Insurance, 3d ed., Section 469 B.

II.

The motion to dismiss the complaint or direct a verdict for the defendant was properly denied.

The converse of this proposition, in the brief which the plaintiff in error used below is based

upon the certificate as to O'Brien's character, signed by Collins, and supposed to have been given to the Surety Company at the time it issued the policy. It is claimed that this certificate made false statements as to O'Brien's character and conduct, and that the Surety Company issued its policy in reliance upon the truth of those statements.

That certificate reads as follows :

“ EMPLOYER'S CERTIFICATE.

“ I have read the foregoing declarations and answers made by George N. O'Brien and believe them to be true.

“ He has been in the employ of this Bank during three (3) years; and to the best of my knowledge has always performed his duties in a faithful and satisfactory manner.

“ His accounts were last examined on the 28th day of March, 1891, and found correct in every respect. He is not to my knowledge, at present, in arrears or in default.

“ I know nothing of his habits or antecedents affecting his title to general confidence, or why the bond he applies for should not be granted to him.

“ Amount required \$15,000.00. Bond to date from July 1, 1891.

“ Dated at San Diego, the 10th day of July, 1891.

“ J. W. COLLINS,

“ Pt. Cal. Nat. Bk.,

“ On behalf of”

The motion for the direction of a verdict was properly denied, for several reasons.

1. The liability of a principal for the *acts* of his

agent is confined of course to those cases where the acts are within the scope of the agent's authority.

Western National Bank *v.* Armstrong,
152 U. S., 346.

United States *v.* City Bank of Columbus, 21 How., 356.

And, as a detail of this, the liability of an innocent principal for the *frauds and deceit* of his agent is restricted to cases where the agent was acting within the scope of his authority.

Story on Agency, § 456.

To make representations as to the honesty of human beings is not within the scope of the authority of the president of a national bank.

Western National Bank *v.* Armstrong,
152 U. S., 346.

The Court, speaking by Mr. justice Shiras, said :
(P. 350.) " There is no evidence whatever that
" the board of directors of the Fidelity National
" Bank gave any authority to Harper to borrow
" money on behalf of the bank, much less to borrow so enormous a sum on so long a time. In
" this respect the complainant's case stands barely
" on the assertion in the bill that ' Harper was the
" ' vice-president and general manager of the Fidelity National Bank, with full authority to make
" ' said loan on its behalf.' The only evidence we
" find in the record to support such averment is
" found in the answer by J. Harvey Waters, the
" general book-keeper of the Fidelity National
" Bank, on cross-examination, wherein he stated
" that E. L. Harper was the vice-president and

“ managing officer, and that by ‘ managing officer ’
 “ he meant that Harper was the ‘ general manager
 “ ‘ of the business of the bank.’ No such office
 “ as that of ‘ general manager ’ is known or named
 “ in the National Bank Acts, nor does any such
 “ office exist by usage. The most that can be
 “ claimed in this case is that Harper acted as the
 “ principal executive officer of the bank. It cannot
 “ be pretended that, as such, he had power, without
 “ authority from the board, to bind the bank by
 “ borrowing \$200,000 at four months’ time.

“ It might even be questioned whether such a
 “ transaction would be within the power of the
 “ board of directors. The powers expressly granted
 “ are stated in the eighth section of the National
 “ Bank Act (Rev. Stat., § 5136, par. 7): A national
 “ bank can ‘ exercise by its board of directors, or
 “ ‘ duly authorized officers or agents, subject to
 “ ‘ law, all such incidental powers as shall be
 “ ‘ necessary to carry on the business of banking,
 “ ‘ by discounting and negotiating promissory
 “ ‘ notes, drafts, bills of exchange, and other evi-
 “ ‘ dences of debt; by receiving deposits; by buy-
 “ ‘ ing and selling exchange, coin and bullion; by
 “ ‘ loaning money on personal security; and by
 “ ‘ obtaining, issuing, and circulating notes.’

“ The power to borrow money or to give notes is
 “ not expressly given by the act. The business of
 “ the bank is to lend, not to borrow, money; to
 “ discount the notes of others, not to get its own
 “ notes discounted. Still, as was said by this
 “ Court, in the case of *First Nat. Bank v. Nat.*
 “ *Exchange Bank*, 92 U. S. 122, 127: ‘ Authority
 “ ‘ is thus given in the act to transact such a bank-
 “ ‘ ing business as is specified, and all incidental

" ' powers necessary to carry it on are granted.
 " ' These powers are such as are required to meet
 " ' all the legitimate demands of the authorised
 " ' business, and to enable a bank to conduct its
 " ' affairs, within the general scope of its charter,
 " ' safely and prudently. This necessarily implies
 " ' the right of a bank to incur liabilities in the
 " ' regular course of its business, as well as to be-
 " ' come the creditor of others.'

" Nor do we doubt that a bank, in certain cir-
 " cumstances, may become a temporary borrower
 " of money. Yet such transactions would be so
 " much out of the course of ordinary and legitimate
 " banking as to require those making the loan to
 " see to it that the officer or agent acting for the
 " bank had special authority to borrow money.

" Even, therefore, if it be conceded that it was
 " within the power of the board of directors of
 " the Fidelity National Bank to borrow \$200,000
 " on time, it is yet obvious that the vice-president,
 " however general his powers, could not exercise
 " such a power unless specially authorised so to
 " do, and it is equally obvious that persons dealing
 " with the bank are presumed to know the extent
 " of the general powers of the officers.

" Without pursuing this part of the subject fur-
 " ther, we think it evident that Harper had no
 " authority to borrow this money, and that the
 " bank cannot be held for his engagements, even if
 " made in behalf of the bank, unless ratification
 " on the part of the bank be shown."

In *United States v. City Bank of Columbus*, 21
 How., 356, Moodie, the cashier of the defendant,
 had signed, as cashier, a writing to the secretary of
 treasury in regard to one Miner, which contained

these words, "He is also authorised, if consistent
 " with the rules of the Treasury Department, to
 " contract, on behalf of this institution, for the
 " transfer of money from the East to the South or
 " West, for the Government " (p. 360).

Under this authority Miner made, on the part of the bank, with the secretary of the treasury, a contract to transfer one hundred thousand dollars to New Orleans and the money never got there.

On a suit against the bank the trial court charged the jury as follows (p. 363):

" That if they should find that the letter written
 " by Moodie was his own act, and had been given
 " without the knowledge or authority of the board
 " of directors, or of any of them individually, except Miner, and that the agency of Miner was
 " not constituted by or known to the board of
 " directors, or the directors individually, or any of
 " them, except Miner, but was the act of the cashier
 " alone; and if they should find that Moodie had
 " no power as cashier, except such as belonged to
 " the office of cashier generally, or such as are
 " given by the charter or by the by-laws or other
 " law or usage of the said bank, that the defendant was not concluded by that letter, and is not
 " bound by the contract made by Miner, without
 " some subsequent ratification of the same, though
 " the Secretary had, in contracting with Miner,
 " relied upon it as as the act of the bank."

The Court, speaking by Mr. justice Wayne, said (p. 363):

" It "—the above charge—" is all that the litigants could have expected, and is liberal to
 " both. It is also in coincidence with the views
 " generally entertained of the powers and duties

“ of the cashiers of banks, and perfectly so with
 “ such as have been expressed by this court in
 “ previous reported cases. In *Fleckner v. The Bank*
 “ of the United States (8 Wheat., 338, 356, 357,)
 “ this court said, the charter authorises the presi-
 “ dent and directors to appoint a cashier and other
 “ officers of the bank, and gives the president and
 “ directors, or a majority of them, full power and
 “ authority to make all such rules and regulations
 “ for the government of the affairs and conducting
 “ the business of said bank as shall not be con-
 “ trary to the act of incorporation. It contains
 “ no regulations as to the duties of cashiers;
 “ with the directors it would rest to fix the
 “ duties of cashier or other officers, whether they
 “ have made any regulation upon this subject
 “ does not appear; but the acts of the cashier,
 “ done in the ordinary course of the business, act-
 “ ually confided to such an officer, may well be
 “ deemed *prima facie* evidence that they fell
 “ within the scope of his duty. In the case *Bank*
 “ of the United States *v. Dunn* (6 Peters, 51,) the
 “ court would not permit the president and cashier
 “ of the bank to bind it by their agreement with the
 “ endorser of a promissory note, that he should not
 “ be liable on his endorsement. It said it is not the
 “ duty of the cashier and president to make such
 “ contracts, nor have they power to bind the bank,
 “ except in discharge of their ordinary duties. All
 “ discounts are made under the authority of the
 “ directors, and it is for them to fix any conditions
 “ which they may think proper in loaning money.
 “ The court defines the cashier of the bank to be
 “ an executive officer, by whom its debts are re-
 “ ceived and paid, and its securities taken and

“ transferred, and that his acts, to be binding upon
 “ a bank, must be done within the ordinary course
 “ of his duties. His ordinary duties are to keep
 “ all the funds of the bank, its notes, bills, and
 “ other choses in action, to be used from time to
 “ time for the ordinary and extraordinary exigen-
 “ cies of the bank. He usually receives directly,
 “ or through the subordinate officers of the bank,
 “ all moneys and notes of the bank, delivers up
 “ all discounted notes and other securities when
 “ they have been paid, draws checks to withdraw
 “ the funds of the bank where they have been de-
 “ posited, and, as the executive officer of the
 “ bank, transacts most of its business.

“ The term ordinary business, with direct ref-
 “ erence to the duties of cashiers of banks, occurs
 “ frequently in English cases, and in the reports
 “ of the decisions of our State courts, and in no
 “ one of them has it been judicially allowed to com-
 “ prehend a contract made by a cashier without an
 “ express delegation of power from a board of
 “ directors to do so, which involves the payment of
 “ money, unless it be such as has been loaned in
 “ the usual and customary way, nor has it even
 “ been decided that the cashier could purchase or
 “ sell the property, or create an agency of any
 “ kind for a bank which he had been author-
 “ ised to make by those to whom has been con-
 “ fided the power to manage its business, both
 “ ordinary and extraordinary. The case of *Kirk*
 “ *v. Bell* (12 English and Common Law Reports,
 “ 389), and that of *Hoyt v. Thompson*, were very ap-
 “ propriately cited by the counsel of the appellee,
 “ in this connection; and we think the safe rule in
 “ all instances of acts done by the officers of cor-

"porate companies, or by those who have the
 "management of their business, from which con-
 "tracts are alleged to have been made, is, to test
 "that fact by an inquiry into the corporate ability
 "which has been given to them, and to their sub-
 "ordinate officers, or which the directors of the
 "company can confer upon the latter to act for
 "them. Such was the view of this Court when it
 "decided, in the case of the Bank of the United
 "States *v.* Dunn (6 Peters), that a release given by
 "its president and cashier to the endorser of a
 "promissory note of his liability upon it, did
 "not bind the bank, neither nor both having
 "any authority to make contracts of that kind.
 "The case before us is one in which a cashier acts
 "alone, and in which he testifies that he did so
 "without any consultation with the president or
 "directors of the company, and of which they had
 "no information from him of the transaction until
 "after the failure of Miner to pay the money in
 "New Orleans. The act under which the City
 "Bank of Columbus became a corporation does
 "not, in any part of it, give any power to a
 "cashier to act independently of the directors.
 "No specific power is given to the directors to
 "appoint a cashier. In the general power given to
 "the directors to appoint officers to do the ordinary
 "business of the bank, they have an authority to
 "appoint a cashier, and such an appointment is a
 "limitation of that officer's executive function in
 "doing the business of the bank. It cannot be
 "pretended that the directors, as a whole, or any
 "one of them, except Miner, consented to the
 "cashier's designation of Miner for any such pur-
 "pose as was concluded between them, to induce

"the Secretary to believe that Miner was the agent
 "of the bank, either to buy stock of the United
 "States or to enter into contracts for the trans-
 "mission of money, free of charge, to those posts
 "where the United States should designate it to
 "be put. Such a power in the Secretary of the
 "Treasury is a necessary one for the transaction
 "of the business of the Government, pervading,
 "as it does, every part of the country. The exer-
 "cise of it, however, requires great care and cau-
 "tion in the selection of agents for such a pur-
 "pose, and no authority short of the most certain
 "should be taken to establish the representative
 "character of any one for a private company or
 "corporation to enter into such a contract with the
 "Secretary."

In Morse on Banks and Banking, § 143:

"§ 143. *President's Authority Virtute Officii.*—
 "The president of the bank is usually, perhaps uni-
 "versally, a member of the board of directors,
 "and is customarily chosen by the board from
 "their own number. Sections 8 and 9 of our
 "National Banking Act prescribe this method for
 "all banks organised under it. It is the duty of
 "the president to preside at meetings of the board
 "of directors. The amount and nature of the
 "duties imposed upon him may vary in different
 "associations according to the usages or the by-
 "laws of each. But ordinarily *the position is one*
 "*of dignity, and of an indefinite general re-*
 "*sponsibility, rather than of any accurately*
 "*known power.* The president is usually ex-
 "pected to exercise a more constant, immediate
 "and personal supervision over the daily affairs of

“the bank than is required from any other director.

“(a) Usage or directorial votes may confer upon him special functions, and may extend his authority to correspond with the increase of active duties. But the authority inherent in the office itself is very small; indeed, it is very difficult to say precisely how or wherein it is really much in excess of that which can be exercised by any other single director. Practically this legal principle is not known, or not distinctly recognised, in very many banks, and frequently presidents undertake to exercise a very considerable control in the daily routine of business. When this is done with the knowledge and approbation, or the tacit sanction, of the board of directors, it may be regarded as legalised by the principles of ratification or usage. Yet these afford an indefinite and dangerous basis on which to rest important dealings. A careful collation of all the adjudicated cases, it must be confessed, wears a striking and peculiar aspect, which is not very favorable to the assumption of any species of executive authority by a bank president without direct authorization. With scarcely an exception, all the decisions are to the effect that the president had no right to perform some particular act, which he had undertaken probably in perfectly good faith to perform, and which had been called in question, and had given rise to the litigation in which it was condemned. So the reader will notice that in discussing this topic we are obliged, in order to keep within the bounds of established law, to confine ourselves almost wholly to what a president can *not* do.

“(b) Indeed, it is a singular fact that the entire
 “collection of judicial authorities justifies the
 “enunciation of only one act as falling within the
 “properly inherent power of the president. This
 “solitary function is to take charge of the litigation
 “of the bank. There is no question that
 “this matter belongs to him by virtue of his office.
 “He may institute and carry on legal proceedings,
 “to collect demands or claims of the bank. He
 “may appear, answer and defend in suits against
 “the bank. He may retain and employ counsel
 “on behalf of the bank. Counsel requested by
 “him to act for the bank will bind it by their action
 “in the case, within the ordinary powers of
 “counsel, by sole authority of their engagement
 “by him. Nor will it make any difference, though
 “circumstances render that engagement originally
 “wrong or improper.* This would be his own
 “breach of trust towards the bank, committed
 “within the scope of his authority, damages
 “for which the bank could only recover
 “from himself, and which could affect no innocent
 “outside parties, whether these should be the
 “counsel employed, or the other litigants in the
 “cause.

“(c) The National Banking Act does not specify
 “the powers of president or cashier. They are
 “held, therefore, to have only such powers as are
 “inherent in such positions by the very nature of

* * § 143. *Savings Bank of Cincinnati v. Benton*, 2 Met. (Ky.),
 “240; *American Ins. Co. v. Oakley*, 9 Paige, 496; *Mumford v.*
 “*Hawkins*, 5 Den., 355; *Oakley v. Workingmen's Benevolent*
 “*Society*, 2 Hilt., 487; *Alexandria Canal Co. v. Swann*, 5 How.,
 “83.”

“ things. All other powers are left to the directors.
 “ The president is generally, if not always, a mem-
 “ ber of the board of directors, and it is his duty to
 “ preside over their meetings. He has inherently
 “ only one power beyond that of any other director,
 “ viz., charge of the bank’s litigation.*

“(d) A bank president may, on sufficient consid-
 “ eration, contract with the defendant in a judg-
 “ ment in favor of the bank to enter a *remittitur*.†”

“ § 145. REPRESENTATIONS AND ADMISSIONS OF
 “ THE PRESIDENT.—Admissions of the president
 “ affect the bank only when they relate to matters
 “ within the scope of his agency.‡ The fact of his
 “ high and responsible position does not operate
 “ to extend in any degree the rigidity of this rule
 “ of the common law.

“(a) Representations of a president, made in
 “ transacting the bank’s business, are admissible
 “ against it; but statements in which the bank has
 “ no interest are not. Like other agents, the presi-
 “ dent must act within the scope of his authority to
 “ bind his principal, unless his acts are ratified.§”

II.—To make such a representation is beyond
 the power of the whole corporation.

The powers of a national bank are confined to the
 business of banking.

California National Bank *v.* Kennedy,
 167 U. S.

“ * Hodges, Executor, *v.* First National Bank, 22 Gratt., 51.”

“ † Case *v.* Hawkins, 53 Ala., 702 (1876).”

“ ‡ Page 145. Spalding *v.* Bank of Susquehanna County, 9 Barr,
 “ 28. See remarks on Declarations and Admissions of Cashiers, *post.*”

“ § Kennedy *v.* Otoe County National Bank, 7 Neb., 59.”

To make representations as to the character of human beings to the end and to the sole end that they may get insurance policies for their own and sole advantage, is not any part of the business of banking.

If, therefore, the board of directors had done it by resolution, it would not have bound the bank.

III.—*The whole matter is a question of fact.*

(a) There is no mention in the policy or bond of any application or certificate. The statements in this certificate cannot, therefore, be warranties. The only ground to be taken therefore is that Collins, assuming to act for the bank, perpetrated a fraud upon the plaintiff in error, and that the bank and its receiver cannot keep the policy without adopting the fraud, and this accordingly is exactly the position which the brief of the plaintiff in error in the court below did take.

Now, whether there has been fraud *is always a question of fact.*

McCullar *vs.* McKinley, 99 N. Y., 353, 357.

Warner *vs.* Norton, 20 How., 448, 460.

Wells, Questions of Law and Fact, § 280.

Courts sometimes takes cases from juries because there is not any evidence at all of fraud, of which *McCullar vs. McKinley*, 99 N. Y., 353, is an instance, but there is not a case in the books where a court has ever *directed* a verdict *finding fraud*. Even in *Edwards vs. Harben* (2 T. R., 587), there had been a verdict for the plaintiff,

which the court simply did not disturb. And all the cases cited in the brief which the plaintiff in error used below, with the exception of two, which are equity cases, and therefore cannot show the distinction, show the same thing. The adjudged cases are often very strict and rigid as to what shall be said in the charge, requiring the court to tell the jury with great distinctness that such and such things are fraud, but they never take the case from the jury.

Even were the doctrine of fraud in law, which was exploded by the Court in *Warner vs. Norton*, 20 How., 448, 460, still in force, it would not apply here. In this sort of a case there must be fraud in fact.

Nat. Life Ins. Co. vs. Minch, 53 N. Y., 144, 151.

(b) But if this be not so—still this case was for the jury, because not only was the evidence of the fraud not certain and conclusive, but it was very slight and inconclusive, if there was any.

There was no certain evidence that any of the statements were false.

As given in the brief used by the plaintiff in error below the statements were as follows:

The whole paper is printed just above,

“ It consisted of two parts—one made by O’Brien
 “ himself and the other *by the bank, as his em-*
 “ *ployer*. In the first O’Brien states that he has
 “ never been in arrears or default in his present
 “ employment; that his accounts were last ex-
 “ amined by the bank examiner, and that they were
 “ found correct. In the second Collins, *acting for*
 “ *the employer, and signing as president of the*
 “ *bank*, states that O’Brien has always performed

“ his duties in a faithful and satisfactory manner ;
 “ that on March 28, 1891, his accounts were ex-
 “ amined and found correct in every respect ; that
 “ he was not in arrears or default, and that noth-
 “ ing was known affecting his title to confidence,
 “ and no reason why the bond for his fidelity
 “ should not be issued.”

Now, there is not a particle of evidence but what O'Brien's accounts were examined on the 28th March, 1891, or that they were not found correct in every respect, or that he was then in arrears or default. There remains, then, to be considered the statements that “ O'Brien has always performed
 “ his duties in a faithful and satisfactory manner ;
 “ that nothing was known affecting his title to
 “ confidence, and no reason why the bond for his
 “ fidelity should not be issued.”

The only evidence about O'Brien's acts prior to the first of July, when this statement was made, is of two things.

In June, 1891, Collins appeared in Denver with three certificates of deposit of the California National Bank—one for \$10,000 and two for \$7,500 each. Using these as collateral he borrowed \$25,000 of one Wood (fols. 244-250) and received the proceeds in a draft for that amount on Chicago—made by the First National Bank of Denver (fol. 250). Collins took this draft to the Denver National Bank, and there with it he paid a debt of his own of five thousand dollars, and he put the remaining twenty thousand to the credit of the California National Bank in the Denver National (fols. 253-259). This was on the twelfth of June. The twenty thousand was subsequently remitted to New York for account of the California National

(fol. 259). So the bank got twenty thousand dollars of this money and Collins five thousand. The certificates thus used were dated the twenty-fifth of May. There was found among the cash a check of Collins of the same date and amount—drawn “to the order of C D” (certificates of deposit) (fol. 625). The check had not been charged to Collins’ account (fol. 181).

The certificates were signed by O’Brien, and that is all the proof of his connection with the matter. Now, the jury could have found from this that O’Brien knew nothing of the transaction. That he had simply left a lot of signed certificates in a book, and that Collins had had them filled out and had used them, or the jury may have found that the certificates were given by O’Brien to Collins to be used for the purposes of the bank; as to the extent of four-fifths of their proceeds they actually were so used. This, as the counsel for the plaintiff in error said in his brief in the court below was common practice, and O’Brien may not have found out about the use of the five thousand dollars by Collins for his private purpose until after the first of July—there were but nineteen days.

The other matter is this: On the sixth of June, 1891, O’Brien put to the credit of Collins in the California National \$20,000, writing on the deposit slip: “By Teleg. Nat. Park Bk.” (fol. 633), and this amount was posted to the credit of Collins’ individual account in the ledger (fols. 829, 216). On the third of June Collins had effected a loan of that amount from the Park Bank to the California National upon a note of the latter bank (fol. 637), the proceeds of which had been placed to the credit of the bank in the Park Bank (fols. 222-4), and

the California bank drew out the money. This was on the sixth of June, but twenty-four days before the statement was made. This was the first time, so far as appears, that O'Brien had done such a thing. This was afterwards charged back to Collins' account (fols. 384-386). Of course, the jury could have found that it was O'Brien who charged it back.

If upon this evidence the plaintiff in error would have had a right to have a verdict directed, then we would have had a right to have a verdict directed upon the principal claim, which is absurd.

The most which can be said is that the evidence is of such sort that the jury could have found upon it either way.

The verdict of the jury has, therefore, established the fact to be that O'Brien had done no wrong act at the time of the making of the statement, but had up to that time been always faithful.

c. Collins does not at all profess to have made the statement in the name of or on the part of the bank. It runs entirely in the first person, expressing his individual belief.

III.

The requests were properly refused.

The *thirty-third* request :

" If the jury find upon the evidence that Collins
 " acted for the bank in procuring the bond sued
 " on, and that before procuring this bond he had

“been guilty of dishonest and fraudulent conduct
 “in connection with his duties as president, and
 “that this fact was known to O’Brien, but was
 “concealed from the surety company, then there
 “can be no recovery in this action.”

The jury *could not* “find upon the evidence that Collins acted for
 “the bank in procuring the bond sued on,” for the reasons above
 given, *i. e.*: 1. That it was not within the scope of his powers as presi-
 dent; and 2. That it was not within the powers of the whole bank.

Collins’ “dishonest and fraudulent conduct” has nothing to do with
 the matter. The representation was not as to *Collins*, but as to O’Brien.

The *thirty-fourth* request:

“If the jury find that at the time of making
 “application for or receiving the bond in suit, *any*
 “*person* acting for the bank represented to the
 “surety company that the accounts of the cashier
 “O’Brien had been examined and had been found
 “to be correct, *and the surety company relied*
 “*upon such representations* when in truth those
 “accounts showed that prior to this time *Collins*
 “had been guilty of dishonest and fraudulent con-
 “duct in his connection with his duties as president
 “of the bank, then there can be no recovery in this
 “action.”

If *Collins* had been guilty “of dishonest and fraudulent conduct in
 “his connection with his duties as president of the bank” the
 “accounts,” if “correct,” ought to show it, and if they *did* show it,
 there was not any misrepresentation.

There was not any evidence of any representation by anybody but
Collins. *Collins* could not have acted “for the bank” in making the
 representation for the reasons above given, *i. e.*, 1. That it was not
 within the scope of his powers as president; and 2. That it was not
 within the powers of the whole bank.

Whether the surety company “relied upon such representations”
 or not does not make any difference. It did not have any *right* to rely
 upon them. It was bound, at its peril, to ascertain whether *Collins* had
 authority.

United States v. Bank of Columbus, 21 How., 356.

“No authority *short of the most certain* should be taken to establish
 “the representative character of any one for a private company or
 “corporation to enter into a contract with the Secretary.”

The *thirty-fifth* request:

“If the jury find that at the time of making ap-

“ plication for the bond in suit *any person* acting
 “ for the bank falsely and fraudulently, and with
 “ knowledge to the contrary, represented to the
 “ surety company that the accounts of the cashier
 “ O'Brien had been examined and had been found
 “ to be correct, when in truth those accounts
 “ showed that prior to this time *Collins* had been
 “ guilty of dishonest and fraudulent conduct in
 “ connection with his duties as president of the
 “ bank, then there can be no recovery in this
 “ action.

This is the same as the last.

The *thirty-sixth* request :

“ If the jury find upon the evidence that the
 “ bond in suit was procured by concealment or
 “ misrepresentation of any facts showing prior
 “ dishonest or fraudulent conduct on the part of
 “ O'Brien, then the plaintiff cannot recover, *no*
 “ *matter who was guilty of such concealment or*
 “ *misrepresentation*. The bank cannot now en-
 “ force the bond without being affected by the
 “ consequence of such concealment or misrepre-
 “ sentation.”

That is to say if a street beggar in New York, who had never had any connection with the bank, but, who represented to the surety company, not that he was acting for the bank, but that by some means he had become acquainted with all its affairs, had made the misrepresentations and concealed things, and the officers of the surety company had seen fit to rely upon it, that would be a defence.

There is not any evidence of anybody making any representation except Collins. The surety company was bound to know, not only that Collins had not any authority, but that all the bank officers and stockholders put together had not any authority or power to make any such representation so that it could bind anybody but their individual selves. This is a question of creditors. Of course it is quite unnecessary to remind the Court that it was the duty of the trial judge to refuse requests not based on evidence—even though they be abstractly correct—because they might confuse the jury.

IV.

The exception to the charge is not well taken.

It is only that Collins' "*knowledge*" did not bind the bank.

Upon this the entire charge had been as follows :

(Fols. 566-8). "A defense has been interposed to which I must call your attention. It is said that this bond of indemnity was obtained upon an application which was certified to by the bank itself, and that in the application facts were misrepresented and facts were concealed— with fraudulent intent on the part of the bank ; therefore that the bond is void. The application was accompanied by a certificate of Collins, the president of the bank. The only knowledge of any facts which ought to have been communicated, or were misrepresented, the only knowledge which the bank possessed at the time that application was made was the knowledge of Collins himself. Ordinarily a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agents ; but in this case all these transactions, if there were any transactions of a fraudulent and dishonest character on the part of the cashier, were transactions for the benefit of Collins, and he was a participator in the fraud, and under those circumstances the law does not infer that the agent or the officer will communicate the fact to his principal, the corporation, and under such circumstances the corporation is not bound by his knowledge. So this defense melts away and there is nothing of it whatever."

And to this the defendant took the following exception.

(Fol. 581). " Mr. Strong: And lastly, your Honor's instructions, that because Mr. Collins was the offender, if there were any offender, therefore his knowledge did not bind the bank."

And it was in relation to proofs which are thus stated in the opinion of the Court of Appeals (fol. 342). " It is unnecessary to multiply references, for in none of the cases cited on the brief of either side, nor in such as have come to the knowledge of this Court in its investigation of the case at bar, are the facts sufficiently analogous to make the citation especially persuasive. It may be well to restate them, thus limiting the application of this decision. The president of a national bank concocts a scheme to purloin its funds, and finding it necessary, in order to accomplish his purpose, to secure the assistance of the cashier, induces him to enter into the plot. The abstraction of the bank's funds is accomplished by means of false entries on the books which deceive the bank examiner, by means of the issue of false certificates of deposit, and by the payment of checks of the main conspirator which are not thereafter charged against him. After these fraudulent practices have gone on for some time, it becomes necessary to file with the bank security for the fidelity of both parties to the scheme. The bank does not select the surety; the two employees, so far as appears, are free to choose whom they please, provided only that the surety be of sufficient ability to respond. Under these circumstances both the dishonest employes individually apply to the same person to become

“ their surety, such person being a company, which,
 “ in some instances, requires a certificate of the
 “ good character of the employé to be given by
 “ the employer before it will consent to underwrite
 “ the honesty of such employé. In some instances
 “ it does not require such a certificate; in Collins’
 “ case it became his bondsman, with no certificate
 “ from any one but himself personally. The giving
 “ of certificates of good character of its employés
 “ is no part of the ordinary business of a bank;
 “ there is nothing to show that the president was
 “ ever authorised by the bank or the board of
 “ directors to act for the bank in making such a
 “ certificate, nor that the bank, either when the
 “ surety was applied to or when the bond executed
 “ by it was delivered to the bank, was informed
 “ that any such certificate was required. The
 “ authorities are not favorable to the assumption
 “ of any species of executive power by a bank presi-
 “ dent without direct authority (Morse on Banks
 “ and Banking, [2d ed.], 143); but there are many
 “ acts which the president of a bank may do with-
 “ out express authority of the board of directors,
 “ in some cases because usage of the particular bank
 “ impliedly authorises them, in other cases because
 “ such acts are fairly within the ordinary routine
 “ of his business as president. The making of
 “ statements, however, as to the honesty and fidel-
 “ ity of an employé for the benefit of the em-
 “ ployé, and to enable the latter to obtain a bond
 “ insuring his fidelity on the strength of such
 “ representations, is no part of the ordinary routine
 “ business of a bank president, and there is noth-
 “ ing to show that by any usage of this particular
 “ bank such function was committed to its presi-
 “ dent.

“ We have reached the conclusion, therefore,
 “ that plaintiff’s right of action on the bond was not
 “ lost because its president, Collins, made to the
 “ defendant false representations as to the cashier’s
 “ honesty. When two officers of a corporation have
 “ entered into a scheme to purloin the money of a
 “ corporation for the benefit of one of them, in
 “ pursuance of which scheme it becomes necessary
 “ to make false representations to a third person,
 “ ostensibly for the bank, but in reality to consum-
 “ mate said scheme and for the benefit of the con-
 “ spirators, and not in the line of ordinary routine
 “ business of such officers and without express au-
 “ thority—the corporation being ignorant of the
 “ fraud—the officers are not, in thus consummating
 “ such theft, the agents of the corporation.”

This exception is not well taken.

In *Wardell v. Railroad Co.*, 103 U. S., 651, 658,
 the Court said (p. 658): “ It is among the rudi-
 “ ments of law that the same person cannot act
 “ for himself, and at the same time, with respect
 “ to the same matter, as the agent of another
 “ whose interests are conflicting,” and further on
 the Court says that this rule applies to directors
 and officers of corporations.

In *United States v. City Bank of Columbus*, 21
 How., 356, the charge of the trial court was (p. 363)
 “ if they should find that the letter written by
 “ Moo... was his own act, and had been given
 “ without the knowledge, or authority of the
 “ board of directors, or any of them individually,
 “ except Miner, and that the agency of Miner was
 “ not constituted by or known to the board of
 “ directors, or the directors individually, or any of
 “ them except Miner,” etc.

If the knowledge of Miner had been the knowledge of the bank, this charge would have been erroneous.

Mr. Morawetz thus states the rule and collects a large number of the adjudged cases. *Private Corporations*, § 540. "Upon similar grounds, it has been held that, when an agent of a corporation himself contracts with the company, or otherwise, deals with it in a transaction, in which his interests are opposed to the interests of the company, his knowledge will not be deemed the knowledge of the company, as to matters connected with that transaction."

In *Re Marseilles Extension Company*, LR 7 Ch 161, the lord justice James said, (p. 170): "Is it to be imputed to the banking company that they have knowledge of every thing the director knows about his own private affairs? Such a proposition seems to be most unreasonable."

Citations to the same effect might be multiplied to a very great extent.

V.

No errors were committed in the admission of evidence.

The errors alleged are three :

1. *The ledger account and the teller's book.*

The ledger account is Collins' deposit account (fols. 820-835). It was proved by the bookkeeper who had kept it and who had made every entry in it except the last two, which were made long afterwards by the bank examiner, and the presence of which was explained (fols. 143-5). This made it admissible.

Insurance Co. *vs.* Weide, 9 Wall., 677.

Insurance Co. *vs.* Weide, 14 Wall., 375.

Bates *vs.* Preble, 151 U. S., 149, 155.

The Mayor of New York *vs.* The Second Ave. R.R. Co., 102 N. Y., 572, 578.

“ There is no doubt that books of account kept
“ in the usual and regular course of business, when
“ supplemented by the oath of the party who kept
“ them, may be admitted in evidence. *Insurance*
“ *Co. vs. Weide*, 9 Wall., 677; *Cogswell vs. Dol-*
“ *iver*, 2 Mass., 217; *White vs. Ambler*, 8 N. Y.,
“ 170.”

Nor is it beyond question but what in this instance the account is the primary, and not secondary evidence. Of course the primary evidence of each transaction on the debit side would be the cheque and the oath of the teller who paid it. Cheques, when paid, are returned, and are consequently the sort of things of which parol evidence

can always be given without making any foundation for it.

This is well settled in New York.

Chrysler vs. Renois, 43 N. Y., 209.

Grover vs. Norris, 73 N. Y., 473, 480.

Daniels vs. Smith, 28 State Rep., 351, 352.

The primary evidence on the credit side would be the oath of the teller where the deposit was currency; his oath and the cheques where the deposits were cheques. These cheques also would be returned. Then there are the deposit slips which we have in proof in this case (fol. 634). These also are of the sort of things of which parol evidence can always be given without making any foundation for it.

Now when a cheque is presented to the teller for payment, the only means which he has of ascertaining whether the account is good for it, is this account. The cheques charged as well as the cheques credited have been returned. Assuming the memory of the teller to be preternatural enough, it would give him each transaction in which he had participated, but it would not give him those in which he had not participated, nor would it give him the balance. Why is not the ledger, which is the first and only record, the primary evidence?

The cases cited in the brief which the plaintiff in error used below have no application. In both of them the books were rejected for want of the proper preliminary proof, and solely for that; and in *Rudd vs. Robinson*, the rule that books kept in the ordinary course of business, where proved by the person

making them, are admissible, is expressly approved—126 N. Y., 117, 119, 120.

Nor are the facts stated in the brief in regard to this matter quite correct. Brimhall, the bookkeeper, who proved the account, *did* make *all* the entries in it except the two final ones made by the bank examiner. He testified that there was another bookkeeper, Rogers, who also worked with him on the ledger (fol. 147), but that upon this account *he*, Brimhall, *made all the entries* (fols. 143, 145-6). "I kept the ledger account of that bank in the year 1891 as such bookkeeper, *and kept the account of J. W. Collins with that bank*" (fol. 143).

"This account contains the *correct* account of the transactions of Mr. Collins with the bank. *The entries were made by reason of checks of Collins that were handed to me, and the credits were obtained from the tags which I received, and they were entered at about the dates thereof for the amounts as stated*" (fols. 145-146). Nor is it correct to say that the witness had no personal knowledge of the transactions. *He had personal knowledge of Collins' cheques, which made up the whole of the debit side of the account. He knew Collins' handwriting, and as for the cheques themselves, it has already been shown that parol evidence may be given of them without foundation, and this witness gives it.* He had also personal knowledge of O'Brien's two deposit slips of the 13th October (167-171) and swore to it. Nobody cares anything about the other credits except to ascertain that they do not sufficiently exceed the amount of the cheques to neutralize the forty-five thousand dollars of the false credits of October thirteenth, and that can be determined from a

simple inspection. It makes no difference who made them nor whether they were true or false so long as there were not enough of them.

But, as already said, they were good evidence.

In this case the teller was dead, and the proof was therefore the best of which, in the existing state of things, the matter was susceptible. The proof of the teller's death was as good under the circumstances as his oath would have been had he been alive.

Nichols vs. Webb, 8 Wheat, 326, 337.

Chenango Bridge Co. vs. Lewis, 63

Barb., 111; approved in *Rudd vs.*

Robinson, 126 N. Y., 117, 119.

The matter of the teller's book is very different. The entries of two days were put in evidence (610-621) to show that nothing was paid on those days for certificates of deposit. This is the only way in which it could be proved, because this is the only place in which it could have been put down. They should have been put upon this book and they are not there. It does not make the least bit of difference who made the entries or whether they were true or false. They are of the *things done*, or rather not done, and therefore admissible. Greenleaf, § 120. If there had been no transactions recorded that day and the page had been blank, it would have been equally admissible and equally conclusive.

But if they need to be proved, they are proved. The items on the lower part of the page, which are the important ones, both because they are the ones which show what we wanted to, and also because all the others enter into and are summed up in

them, are proved to be in the handwriting of the teller (fols. 172-178), and the teller is dead. This makes them admissible.

Nichols vs. Webb, 8 Wheat., 326, 337.

Chenango Bridge Co. vs. Lewis, 63 Barb., 111; approved in *Rudd vs. Robinson*, 126 N. Y., 117, 119.

And lastly—The matters are of no possible consequence. The court took the issue, of which the latter day's entries were a part, away from the jury.

The former one is the matter of O'Brien's making the certificates of twenty-fifth May given under Point II.

2. *Evidence as to alleged prior frauds.*

This was admissible as bearing upon O'Brien's knowledge of what he was doing.

N. Y. Mutual Life Ins. Co. vs. Armstrong, 117 U. S., 591, 598.

3. *The extent of Collins' indebtedness to the bank.*

Its legitimate bearing on the transactions was upon the fraudulent or dishonest intent of O'Brien. If Collins had owed nothing and been responsible, an act entrusting him with some of the monies of the bank would have been very different in its nature and consequences, and consequently in its intent.

N. Y. Mutual Life Ins. Co. v. Armstrong, 117 U. S., 591, 598.

There was no incompetent evidence of this matter admitted.

The account (fols. 733-819) was neither introduced nor used to show Collins' indebtedness. That had already been proved by the testimony of the expert, which was not even objected to (fol. 313).

The account was put in as a part of the correspondence, *and as a notification to the Surety Company of what the receiver claimed, so that it might examine for itself. It did so examine, by its own expert, who went twice to San Diego for the purpose, and had full access to the books* (fols. 508-512), and the only inaccuracy claimed as the result of those two examinations was in a single item of ten thousand dollars (fols. 494).

The difficulty about getting it in evidence (fols. 376-383) was not at all because of its incompetency, but because of the difficulty of proving a copy, the Surety Company having failed to produce the original.

The judgment should be affirmed.

EDWARD WINSLOW PAIGE,
Of Counsel.

AMERICAN SURETY COMPANY v. PAULY (No. 1).

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 168. Argued January 6, 7, 1898. — Decided April 18, 1898.

In an action against the maker of a bond, given to indemnify or insure a bank against loss arising from acts of fraud or dishonesty on the part of its cashier, if the bond was fairly and reasonably susceptible of two constructions, one favorable to the bank and the other to the insurer, the former, if consistent with the objects for which the bond was given, must be adopted.

Under the condition of the bond in this case, requiring notice of acts of fraud or dishonesty, the defendant was entitled to notice in writing of any act of the cashier which came to the knowledge of the plaintiff of a fraudulent or a dishonest character as soon as practicable after the plaintiff acquired knowledge; and it is not sufficient to defeat the plaintiff's right of action upon the policy to show that the plaintiff may have had suspicions of dishonest conduct of the cashier; but it was plaintiff's duty, when it came to his knowledge, when he was satisfied that the cashier had committed acts of dishonesty or fraud likely to involve loss to the defendant under the bond, as soon as was practicable thereafter to give written notice to the defendant: though he may have had suspicions of irregularities or fraud, he was not bound to act until he had acquired knowledge of some specific fraudulent or dishonest act that might involve the defendant in liability for the misconduct.

When the bank suspended business, and the investigation by the examiner commenced, O'Brien ceased to perform the ordinary duties of a cashier; but within the meaning of the bond, he did not retire from, but remained in, the service of the employer during at least the investigation of the bank's affairs and the custody of its assets by the national bank examiner, which lasted until the appointment of a receiver and his qualification. *Held*, that the six months from "the death or dismissal or retirement of the employé from the service of the employer," within which

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his fraud or dishonesty must have been discovered in order to hold the company liable, did not commence to run prior to the date last named.

The making of a statement as to the honesty and fidelity of an employé of a bank for the benefit of the employé, and to enable the latter to obtain a bond insuring his fidelity, was no part of the ordinary routine business of a bank president, and there was nothing to show that by any usage of this particular bank such function was committed to its president.

The presumption that an agent informs his principal of that which his duty and the interests of his principal require him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal; and in such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf.

When an agent has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then under such circumstances the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed.

THE case is stated in the opinion.

Mr. Henry C. Willcox and *Mr. Walter D. Davidge* for plaintiff in error. *Mr. Walter D. Davidge, Jr.*, was on their brief.

Mr. Edward Winslow Paige for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The defendant in error as receiver of the California National Bank of San Diego, California, brought this action against the plaintiff in error, a corporation of New York, upon a bond of the latter for \$15,000 guaranteeing or insuring the bank, subject to certain conditions, against any act of fraud or dishonesty committed by George N. O'Brien in his position as cashier of that institution.

This bond was based upon an application by O'Brien to the Surety Company accompanied by written declarations and

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answers to questions relating to his age, history, habits, financial condition, etc. He presented with the application the following certificate, signed by J. W. Collins as president of the bank: "I have read the foregoing declarations and answers made by George N. O'Brien, and believe them to be true. He has been in the employ of this bank during three years; and to the best of my knowledge has always performed his duties in a faithful and satisfactory manner. His accounts were last examined on the 28th day of March, 1891, and found correct in every respect. He is not to my knowledge, at present, in arrears or in default. I know nothing of his habits or antecedents affecting his title to general confidence, or why the bond he applies for should not be granted to him."

The bond was executed July 1, 1891. After reciting that the employé, O'Brien, had been appointed in the service of the employer, the bank, had been assigned to the office or position of cashier, and had applied to the American Surety Company of New York for a bond, it provided:

"Now, therefore, in consideration of the sum of seventy-five dollars, lawful money of the United States of America, in hand paid to the company, as a premium for the term of twelve months ending on the first day of July, one thousand eight hundred and ninety-two, at 12 o'clock noon, it is hereby declared and agreed that, subject to the provision herein contained, the company shall, within three months next after notice, accompanied by satisfactory proof, of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer, of moneys, securities or other personal property in the possession of the employé, or for the possession of which he is responsible, by any act of fraud, or dishonesty, on the part of the employé, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal, or retirement of the employé, from the service of

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the employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, shall be *prima facie* evidence thereof. Provided always, that the company shall not be liable, by virtue of this bond, for any mere error of judgment or injudicious exercise of discretion on the part of the employé, in and about all or any matters, wherein he shall have been vested with discretion, either by instruction, or rules and regulations of the employer. And it is expressly understood and agreed that the company shall in no way be held liable hereunder to make good any loss which may accrue to the employer by reason of any act or thing done, or left undone, by the employé, in obedience to, or in pursuance of, any direction, instruction or authorization conveyed to and received by him from the employer or its duly authorized officer in that behalf; and it is expressly understood and agreed that the company shall in no way be held liable hereunder to make good any loss, by robbery or otherwise, that the employer may sustain, except by the direct act or connivance of the employé.

"The following provisions are to be observed and binding as a part of this bond:

"That the company shall be notified in writing, at its office in the city of New York, of any act on the part of the employé, which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer. That any claim made in respect of this bond shall be in writing, addressed to the company, as aforesaid, as soon as practicable after the discovery of any loss for which the company is responsible hereunder, and within six months after the expiration or cancellation of this bond as aforesaid. And upon the making of such claim, this bond shall wholly cease and determine as regards any liability for any act or omission of the employé committed subsequent to the making of such claim, and shall be surrendered to the company on payment of such claim."

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"That if the company shall so elect, this bond may be cancelled at any time by giving one month's notice to the employer, and refunding the premium paid, less a *pro rata* part thereof for the time said bond shall have been in force, remaining liable for all or any default covered by this bond, which may have been committed by the employ , up to the date of such determination, and discovered and notified to the company within the limit of time hereinbefore provided for.

"That the employer shall, if required by the company, and as soon thereafter as it can reasonably be done, give all such aid and information as may be possible (at the cost and expense of the company), for the purpose of prosecuting and bringing the employ  to justice, or for aiding the company in suing for and making effort to obtain reimbursement by the employ  or his estate, of any moneys which the company shall have paid or become liable to pay by virtue of this bond.

"That no suit or proceeding at law or in equity shall be brought to recover any sum hereby insured, unless the same is commenced within one year from the time of the making of any claim on the company."

"It is further agreed that this bond may at the option of the employer be continued in force from year to year at the same premium rate as long as the company shall consent to receive the same, in which case the company shall remain liable for any dishonest act of the employ  occurring between the original date of this bond and the time to which it shall have been continued."

On the application of Collins, a bond, with like conditions, was made the same day by the Surety Company in the penalty of \$25,000 guaranteeing the bank against loss by any act of fraud or dishonesty on his part as its president.

The complaint set out certain acts of fraud and dishonesty by O'Brien in his office of cashier whereby, it was alleged, the bank lost an amount in excess of that named in the bond. All the material allegations of the complaint were denied by the answer. The result of the trial was a judgment in favor of the plaintiff for \$16,847.50, which was the amount of the

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bond with interest ; also for \$385.73 costs and \$202.16 interest on the verdict ; in all, \$17,435.39. That judgment was affirmed in the Circuit Court of Appeals. 38 U. S. App. 254.

Upon certain issues in the case there was a decided conflict in the evidence, particularly as to the time when the receiver first discovered that O'Brien as cashier had committed an act that might involve a loss for which the Surety Company would be liable and of which it was entitled to be notified in writing as soon as practicable after the occurrence of such act came to the knowledge of the bank.

In view, however, of the verdict, and assuming that the jury had due regard to the instructions of the court, the following facts may be regarded as established by the evidence :

On the 13th and 14th days of October, 1891, O'Brien, being cashier, fraudulently and dishonestly placed to the credit of Collins, the president of the bank, two sums, \$20,000 and \$24,500.

The bank suspended business on the 12th day of November, 1891 at which time Collins had to his credit on its books only \$11,420.90. Of the above sums aggregating \$44,500 falsely credited to him, he drew out, on his own checks, \$33,029.10, which was wholly lost to the bank.

Immediately upon the suspension of the bank an examiner appointed by the Comptroller of the Currency, Rev. Stat. § 5240, entered upon an investigation of its affairs.

On the 18th day of December, 1891, Pauly was appointed receiver, Rev. Stat. §§ 5205, 5234, and having qualified as such, took possession on the 29th day of December, 1891, of the books, papers and assets of the bank — continuing its employes in his service for a short time.

O'Brien remained in service under the receiver until about March 2, 1892, when he left, because the receiver declined to pay his salary — the latter saying that he would regard it as credited or paid on any indebtedness of O'Brien's to the bank.

During January, February and March, 1892, there was a general examination of the books of the bank under the direction of the receiver. And about April 1, 1892, one Bloodgood, an expert bookkeeper, in connection with another

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bookkeeper, entered upon a particular examination of such books, with a view of ascertaining the transactions of Collins while he was president. Collins died March 3, 1892. Towards the end of May these experts made certain discoveries involving the fidelity and integrity of O'Brien as cashier, of which Bloodgood gave notice to the receiver. The facts thus discovered related to the false credits which, as above stated, O'Brien as cashier had given to Collins on the books of the bank.

It is to be taken upon this record, after the verdict of the jury, that although the general examination of the bank's books in January, February and March, 1892, indicated that there were probably irregularities in the conduct of the bank's business, the receiver was not aware of "the amounts and special conditions" of such irregularities nor of any specific act of fraud or dishonesty upon the part of the cashier, until the expert bookkeepers had completed their examination of the books of the bank about May 23, 1892, on which day the receiver wrote to the Surety Company, giving notice of the discovery of fraud that entitled him as receiver to look to that company upon its bonds for the fidelity and integrity of Collins and O'Brien. That letter was as follows: "I write to notify you that the California National Bank held a bond to the amount of \$20,000 in its favor for the faithful performance of duties by J. W. Collins, its late president, also in favor for the faithful performance of duties by George N. O'Brien, its cashier, for \$15,000. I therefore notify you that a discovery of fraud has been made of sufficient amount to require the payment of those indemnity bonds to the undersigned receiver of the California National Bank. I therefore ask that you forward us the necessary blanks to make the claim or claims in proper form."

This letter appears to be undated, but the time is shown by the following letter, dated May 31, and addressed by the vice president of the Surety Company to the receiver: "We are this morning in receipt of your letter of the 23d inst., stating that you have discovered fraud on the part of J. W. Collins, late president of the California National Bank, and on the

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part of George N. O'Brien, late cashier of said bank, sufficient to require payment by this company under bonds heretofore issued upon the parties named in favor of the said California National Bank. I transmit herewith two claim blanks with three continuation sheets with each, upon which please itemize any claim you may have to present under the bond of J. W. Collins; also upon the bonds of George N. O'Brien; showing the precise dates of alleged embezzlements on the part of said John W. Collins and said George N. O'Brien; and the amounts thereof; after which please attest the same under oath and transmit to this office, furnishing to our inspector, Mr. Bradbury Williams, who will call upon you, a duplicate statement of the items, with the dates thereto attached, so that he may be able to verify the account. Will you also please inform me where George N. O'Brien is at present, and whether you have made a formal demand upon him for the amount alleged to be due and whether he has refused to pay the same; also the date of said demand; and if made in writing will you please send us a copy of said demand and furnish a copy to our inspector, Mr. Bradbury Williams. We desire to have you perfect your claims with the utmost expedition, and when received they will be duly considered."

Under date of June 24, 1892, the receiver wrote to the vice president of the Surety Company: "In reply to yours of the 31st ult., I hand you herewith two affidavits in regard to the embezzlement of the late J. W. Collins and George N. O'Brien, furnished after consultation with my legal adviser, as giving information fuller than I otherwise could do by using the blank sent me in your favor of above date. Mr. G. N. O'Brien is still living in San Diego City. A formal demand was made upon him in writing for the amounts embezzled by his aid and assistance from the California National Bank, to which he has as yet made no reply. The affidavit herein relative to J. W. Collins includes an item of \$10,000 discovered after making the affidavit sent you before. Duplicate affidavits and copy of the demand made upon G. N. O'Brien will be furnished your Mr. Bradbury Williams when he calls.

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Trusting you will find this statement explicit enough for your purpose, and that we may in the near future receive payment as required under the bonds that should guarantee the California National Bank against loss on the part of the hereinbefore mentioned J. W. Collins and George N. O'Brien."

The questions of law presented for consideration will be better understood if the following additional facts be stated :

With the above letter of June 24, 1892, was an affidavit of the receiver called in the record "Proof of Claim." That document stated among other things that on the 13th and 14th days of October, 1891, O'Brien, as cashier, made entries of the deposit tags, and caused to be entered in the books of the bank credits in favor of Collins amounting to forty-five thousand dollars without Collins paying any consideration therefor, and without being entitled thereto, as O'Brien well knew ; that the nature, extent, amount and circumstances connected with these wrongful acts of O'Brien had come to the knowledge of the receiver and of the bank since the first day of February, 1892 ; that O'Brien was not entitled to any credits, and the bank was not indebted to him in any sum ; that at the date of the suspension of the bank his account was overdrawn, and he was at that date indebted to the bank ; that the above statements as to his wrongful, unlawful and fraudulent acts as cashier of the bank between the first of July, 1891, and the 12th day of November, 1891, the last date being the date of the suspension of the bank, included all the money misappropriated, wrongful and improper entries and fraudulent and wrongful conduct upon the part of O'Brien that had come to the knowledge of the receiver, and constituted a true and correct statement of the account between him and the bank.

On the same day, June 24, 1892, the receiver mailed to the Surety Company a written notice containing substantially the same statements as were contained in the above affidavit, and concluding : "That in pursuance of a certain bond numbered 85,565, heretofore issued by your company, in which you agree to make good and reimburse the said California National Bank of San Diego all and any pecuniary loss sustained during the

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continuance of the bond on account of the fraud or dishonesty of the said G. N. O'Brien, after a written statement of said loss is presented, this notice is given by the undersigned, Frederick N. Pauly, receiver of the California National Bank of San Diego, appointed such receiver December 18, 1891, by the Comptroller of the Currency of the United States, and attached hereto is a statement of the loss, duly certified by the said receiver, now representative of said employer named in said bond; that said George N. O'Brien is insolvent; that demand in writing has been made upon him that he reimburse and repay to said bank the amounts hereinbefore dishonestly and fraudulently obtained of said bank, which he has refused to do. This notice is given you as soon as practicable after the occurrence of the wrongful acts hereinbefore referred to and demand is hereby made upon you by the undersigned, as representative of said bank and as such receiver, for the sum of fifteen thousand dollars (\$15,000), the amount in said bond stipulated."

On the 8th day of July, 1892, the Surety Company addressed to the receiver the following letter: "We are in receipt of your two letters of the 24th ultimo, transmitting two affidavits relative to the claim under the bonds of this company to the California National Bank for J. W. Collins and George N. O'Brien in the respective positions of president and cashier of said bank. We have respectfully to request that you will make a statement of each on the claim forms which we use for that purpose, two of which are herewith enclosed. We desire full information in regard to the shortages and credits, of every kind whatever, whether on account of salary due, money paid or assignments made by either of said persons to the California National Bank. If there has been any action brought against Mr. George N. O'Brien, or any correspondence between the bank or you with either of the persons in regard to the matter, we should be pleased to have copies thereof."

To this letter the receiver, under date of July 18, 1892, made the following reply: "In reply to yours of 8th instant relative to my claim under the bonds of your company to the

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California National Bank for J. W. Collins and G. N. O'Brien, I beg to herewith send you a statement of account of J. W. Collins, showing the amount of his deficiency to be \$374,978.22. A list of the property assigned by J. W. Collins to the California National Bank with the estimation of the value thereof. J. W. Collins under the name of Dare & Collins is a defaulter to the bank in the sum of \$348,703.52 in addition to the amount above stated. An itemized statement of the account can also be forwarded you if desired. With regard to G. N. O'Brien, no action has been brought against him, because he is execution proof. In reply to my demand for payment for the amounts embezzled by J. W. Collins during the term covered by these bonds, he replied as per copy of his letter herewith enclosed. In compliance with the request of the U. S. Attorney I appeared before the grand jury and testified as to the state of facts that existed implicating G. N. O'Brien in the defalcations with J. W. Collins. What action the grand jury will take has not yet transpired. Trusting that these statements will meet your requirements, I am, etc."

Other letters passed between the receiver and the company, in respect to which it is only necessary to observe that the company retained the proofs of loss sent to it without objecting that they did not sufficiently indicate the nature and extent of the claim made by the receiver. Finally, the receiver, writing to the vice president of the company, under date of September 21, 1892, said: "There has been so much delay in this matter that I have placed it, under the direction of the Comptroller, in the hands of the U. S. Attorney in New York, Edward Mitchell, Esq., with instructions to collect the same." The company in reply expressed their gratification that when taking up the matter finally it could deal with the United States in New York on the merits of the case.

In the light of the facts, as above stated, we come to the consideration of the controlling questions of law presented for determination. These questions depend largely upon the interpretation to be given to the provisions of the bond in suit.

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If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the Surety Company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers or agents of the Surety Company. This is a well established rule in the law of insurance. *National Bank v. Insurance Co.*, 95 U. S. 673; *Western Ins. Co. v. Cropper*, 32 Penn. St. 351, 355; *Reynolds v. Commerce Fire Ins. Co.*, 47 N. Y. 597, 604; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 666; *Fowkes v. Manchester &c. Life Ass'n*, 3 Best & Smith, 917, 925. As said by Lord St. Leonards in *Ander-son v. Fitzgerald*, 4 H. L. Cas. *484, *507, "it [a life policy] is of course prepared by the company, and if therefore there should be any ambiguity in it, must be taken, according to law, most strongly against the person who prepared it." There is no sound reason why this rule should not be applied in the present case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which in the employer's service he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank.

It was contended in the court below, as it is here, that the receiver did not comply with that provision of the bond requiring written notice to be given to the company, at its office in New York, of any act on the part of O'Brien "which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer." The company insists that the receiver in January, February, March and April, 1892, had such information in respect of the acts of O'Brien as cashier, as made it his duty, long before

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his letter of May 23, 1892, to give the required notice to the company. Upon this part of the case Judge Wallace, referring to the clause of the policy requiring notice of acts that might involve loss to the defendant, said to the jury: "Under that condition of the policy the defendant was entitled to notice in writing of any act of the cashier which came to the knowledge of the plaintiff of a fraudulent or a dishonest character as soon as practicable after the plaintiff acquired knowledge. It is not sufficient to defeat the plaintiff's right of action upon the policy that it be shown that the plaintiff may have had suspicions of dishonest conduct of the cashier; but it was plaintiff's duty under the policy, when it came to his knowledge, when he was satisfied that the cashier had committed acts of dishonesty or fraud likely to involve loss to the defendant under the bond, as soon as was practicable thereafter to give written notice to the defendant. Now, the written notice, the first written notice, was given on the 23d day of May, 1892. And in considering this issue you are to inquire first, when it was that the plaintiff became satisfied that the cashier had committed dishonest or fraudulent acts which might render the defendant liable under this policy. He may have had suspicions of irregularities; he may have had suspicions of fraud, but he was not bound to act until he had acquired knowledge of some specific fraudulent or dishonest act which might involve the defendant in liability for the misconduct. Now, when was it he acquired such knowledge? A good deal of testimony has been introduced here upon that issue. After acquiring it, it was his duty, not as soon as possible, to transmit information of it to the defendant, but to do it with reasonable promptness. He was not bound the first day or the next, necessarily, to give notice, but he was to give notice within a reasonable time; and it is for you to say, upon a consideration of all the circumstances of the case, whether he did within a reasonable time after acquiring such knowledge, send the letter of May 23d. It might be reasonable under one state of facts; it might be unreasonable under another. What might be very great diligence under one set of circumstances might be very dilatory

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under another. Now, first, you are to determine when he really acquired the knowledge. I am not going to recapitulate the testimony. It is claimed upon his part that he did not acquire the knowledge until the close of the examination by the expert, and that was only within a day or two of the time of mailing the notice; and so testimony has been given to show that such examination commenced on the first of April and was continued until the latter part of May. On the other hand it is claimed that he must have acquired knowledge much earlier than this. Now, there is a circumstance of some significance. It is hardly to be supposed that this receiver, holding an official trust, would retain in his employ a cashier after he had become satisfied that by the dishonesty or the fraud of that cashier the bank had sustained serious loss. He did retain him until the 2d day of March. And it may be that while he and those associated with him were entirely satisfied that there had been irregularities, and even perhaps that there had been frauds on the part of the president, they were not aware of any specific acts which could be designated as fraudulent or dishonest on the part of the cashier until the investigation had progressed for a considerable length of time. On the other hand, you have heard the plaintiff's testimony as given in depositions taken in the west. Various extracts have been read, and it is insisted upon the part of the defendant that he must have known of these acts as early as the early part of February, 1892. Now, I charge you, as a matter of law, that if the facts were, as they were assumed to be, at the outset of the trial, that is, that the discovery was made early in February and notice was not given until July, that was not notice with reasonable promptness. And I do not know but that I should charge you, as a matter of law, that if the fact were discovered in the early part of February, and notice was not given until the latter part of May, that was not notice given with reasonable promptness. But if you come to the conclusion that the discovery was not made until the middle or latter part of May, then, in view of the situation of the plaintiff you may reasonably come to the conclusion that he exercised proper diligence in sending the notice."

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We perceive no error in these instructions. They are entirely consistent with the terms of the contract. Much stress was laid, in argument, upon the words "which may involve loss" in the above extract from the bond. But when those words are taken with the words in the same sentence, "as soon as practicable after such act shall have come to the knowledge of the employer," it may well be held that the Surety Company did not intend to require written notice of any act upon the part of the cashier that might involve loss, unless the bank had knowledge, not simply suspicion, of the existence of such facts as would justify a careful and prudent man in charging another with fraud or dishonesty. If the company intended that the bank should inform it of mere rumors or suspicions affecting the integrity of O'Brien, such intention ought to have been clearly expressed in the bond. It was left to the jury to determine when the receiver first acquired knowledge of acts indicating fraud or dishonesty on O'Brien's part, and they found, in effect, that he had no knowledge of any such act until after the report by the expert bookkeepers made about or a few days before May 23, 1892. The trial court went far enough when it said in response to an inquiry by a juror, that notice given May 23, 1892, of a fraud by the cashier discovered as early as March 2d—the day on which O'Brien left the receiver—was not as soon as practicable after the receiver acquired knowledge of the facts.

We have seen that by the terms of the bond in suit the company agreed to make good and reimburse a loss to the bank caused by any act of fraud or dishonesty on the part of O'Brien in connection not only with his duties as cashier, but in connection with "the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during such continuance or within six months thereafter *and* within six months from the death or dismissal or retirement of the employé from the service of the employer."

The frauds to which the verdict of the jury referred occurred in October, 1891, during the continuance of the bond.

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The bank suspended November 12, 1891. The company insists that, within the meaning of the bond, O'Brien's "retirement" occurred when the bank ceased to do business and closed its doors and the bank examiner entered upon an investigation of its affairs; consequently, it was argued, the discovery of the fraud was not within six months from the "retirement of the employé from the service of the employer."

Undoubtedly the company did not agree to be liable for any fraudulent or dishonest act of the cashier not discovered until after six months from his retirement from the service of the bank. But is it true that, within the meaning of the bond, O'Brien retired from the service of the bank when it suspended business on November 12, 1891? We think not. The bank was in existence under its articles of association while the examiner, under the order of the Comptroller of the Currency, was engaged in the investigation of its affairs. Such investigation did not of itself have the effect to discharge O'Brien from its service. It is true that when the bank suspended business, and the investigation by the examiner commenced, O'Brien ceased to perform the ordinary duties of a cashier. But within the meaning of the bond, O'Brien did not retire from, but remained in, the service of the employer during at least the investigation of the bank's affairs and the custody of its assets by the national bank examiner, which lasted until the appointment of a receiver and his qualification on the 29th day of December, 1891. Certainly, the six months from "the death or dismissal or retirement of the employé from the service of the employer," within which his fraud or dishonesty must have been discovered in order to hold the company liable, did not commence to run prior to the date last named. The bond prescribed at least three limitations of time: First, the company was entitled to written notice of any act of fraud or dishonesty on the part of the employé which might involve loss to it, as soon as practicable after the occurrence of such act should come to the knowledge of the employer; second, it was to be liable only for an act of fraud or dishonesty oc-

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curing and discovered during the continuance of the bond and within six months thereafter; third, it was not liable, in any event, for any act of fraud or dishonesty, even if committed during the continuance of the bond, unless it was discovered within six months from the death, dismissal or retirement of the employé from the service of the employer. Of course, O'Brien's death would have terminated his employment as cashier. But he was never dismissed, for his dismissal could only have occurred by the act of the bank or of some one who represented it before or after it suspended business. His "retirement," which would arise from his voluntary act, occurred either when he took service under the receiver, or when he voluntarily left that service on the 2d day of March, 1892. Whether within the meaning of the bond O'Brien was in "the service of the employer" while he was in the service of the receiver, we need not say. It is sufficient for this case to hold that he was in the service of the employer at least up to the time of the receiver's appointment and qualification, which occurred within six months prior to the discovery of his fraud and dishonesty and the giving of notice thereof. We, therefore, hold that the acts of fraud or dishonesty here involved were discovered during the continuance of the bond and within six months after the retirement of the employé from the service of the employer.

In its charge to the jury the trial court called attention to another defence made by the company, namely, that the bond was void by reason of fraudulent misrepresentations and concealments of Collins acting as the president of the bank. The court said: "It is said that this bond of indemnity was obtained upon an application which was certified to by the bank itself, and that in the application facts were misrepresented and facts were concealed with fraudulent intent on the part of the bank; therefore that the bond is void. The application was accompanied by a certificate of Collins, the president of the bank. The only knowledge of any facts which ought to have been communicated, or were misrepresented, the only knowledge which the bank possessed at the time that application was made, was the knowledge of Collins

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himself. Ordinarily a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agents; but in this case all these transactions, if there were any transactions of a fraudulent and dishonest character on the part of the cashier, were transactions for the benefit of Collins, and he was a participator in the fraud, and under those circumstances the law does not infer that the agent or the officer will communicate the fact to his principal, the corporation, and under such circumstances the corporation is not bound by his knowledge. So this defence melts away and there is nothing of it whatever."

The company insists that in obtaining the bond in suit Collins acted for the bank, and as a corporation can only speak by agents, the bank is responsible for any false or fraudulent statements in the certificate given by Collins to the Surety Company, and which he signed as president of the bank.

In support of its contention the company cites *Franklin Bank v. Cooper*, 36 Maine, 179, 197; *Graves v. Lebanon Nat. Bank*, 10 Bush, 23, 29; *Veazie v. Williams*, 8 How. 134, 156; *Bennett v. Judson*, 21 N. Y. 239; *Nat. Life Ins. Co. v. Minch*, 53 N. Y. 144, 149; *Holden v. New York & Erie Bank*, 72 N. Y. 286, 292; *Elwell v. Chamberlin*, 31 N. Y. 611, 619. What were those cases?

Franklin Bank v. Cooper was the case of a suit against the executor of one of the sureties in a cashier's bond. Prior to the acceptance of the bond by the directors of the bank a deficiency or defalcation existed in the cashier's accounts, of which the president and some of the directors had knowledge when the bond was taken, but which fact was not communicated to the surety. After observing that knowledge by the surety of the existing deficiency in the cashier's accounts might have had an important influence on his conduct, the court said: "One who becomes surety for another must ordinarily be presumed to do so upon the belief that the transaction between the principal parties is one occurring in the usual course of business of that description, subjecting him only to the ordinary risks attending it; and the party to whom he

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becomes a surety must be presumed to know that such will be his understanding and that he will act upon it, unless he is informed that there are some extraordinary circumstances affecting the risk. To receive a surety known to be acting upon the belief that there are no unusual circumstances by which his risk will be materially increased, well knowing that there are such circumstances and having a suitable opportunity to make them known and withholding them, must be regarded as a legal fraud, by which the surety will be relieved from his contract."

Graves v. Lebanon Nat. Bank was a suit upon the bond of a cashier of the bank. The court stated the case to be one in which the directors of a bank "held out" to others as a trustworthy officer a man who had been guilty of repeated embezzlements and frauds, all of which might have been discovered by the exercise of slight diligence by the directors. The grounds upon which the surety was held discharged were thus stated by the court: "There is no principle of law better settled than that persons proposing to become sureties to a corporation for the good conduct and fidelity of an officer to whose custody its moneys, notes, bills and other valuables are entrusted have the right to be treated with perfect good faith. If the directors are aware of secret facts materially affecting and increasing the obligation of the sureties, the latter are entitled to have these facts disclosed to them, a proper opportunity being presented."

Veazie v. Williams was the case of a purchaser at an auction sale, seeking to be relieved from his purchase because of fraud practised at the sale by the auctioneer, who was the general agent of the owners, and the benefits of which sale the owners received. After a reference to many authorities, the court placed the liability of the owners upon these grounds: "What the vendor may not do in person or may not employ others to do in his absence—that is, make by-bids to enhance the price—his agent, the auctioneer, cannot rightfully do. But they are held liable on a ground beyond and apart from all this, and as well settled in England as here, that if a principal ratify a sale by his agent, and take the benefit of it, and it

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afterwards turn out that fraud or mistake existed in the sale, the latter may be annulled and the parties placed *in statu quo*; or they may, where the case and the wrong are divisible, be at times relieved to the extent of the injury. . . . But the test here is, Was the purchaser deceived, and has the vendor adopted the sale, made by deception, and received the benefits of it? For, if so, he takes the sale with all its burdens. *Wilson v. Fuller*, 3 Ad. & Ell. (N. S.) 68. The sale, thus made here, was adopted and carried into effect by the respondents; and hence, on account of the fraud involved in it, they should either restore the consideration and take back the mills, or indemnify the purchaser to the extent of his suffering."

In *Bennett v. Judson* — which was the case of an agent of the vendor of land who made material misrepresentations as to its location and qualities, assuming to have knowledge of the facts, but without express authority from his principal — the court said: "There is no evidence that the defendant authorized or knew of the alleged fraud committed by his agent Davis in negotiating the exchange of lands. Nevertheless, he cannot enjoy the fruits of the bargain, without adopting all the instrumentalities employed by the agent in bringing it to a consummation. If an agent defraud the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may, no doubt, rescind, when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefits of the dealing, he cannot claim immunity, on the ground that the fraud was committed by his agent and not by himself. This is elementary doctrine, and it disposes of one of the questions raised at the trial."

In *National Life Ins. Co. v. Minch* — which was an action to recover back money paid on a policy fraudulently obtained by a husband on the life of his wife, the fraud not having been discovered until after the money was paid — the court said: "Again, if the husband, as the agent of the wife, procured the policy by fraud, she cannot retain the benefit of it and be relieved from the consequences of the fraudulent means by

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which it was obtained. It is established that an innocent principal cannot take an advantage resulting from the fraud of an agent without rendering himself civilly liable to the injured party. 10 N. Y. 34; *Graves v. Spier*, 58 Barb. 349. If the husband obtained the policy by a fraud, acting as the agent of his wife, he occupies the position of claiming to keep money, as her legal representative, which he fraudulently obtained as her agent. He is defending this action upon her title to the policy, which, if procured by his fraud, is invalid."

Holden v. New York & Erie Bank was an action grounded on the fraud of a cashier in certain matters with which he was connected not only as cashier but individually and as executor of an estate. The court said: "As matter of fact, whatever knowledge, information or notice he had in either of these capacities, he carried with him into his exercise of the other. As agent of the bank, he owed it a duty in every transaction in which the bank took a part, under his observation. Hence, as matter of law, whatever notice of facts he had in any capacity, which were material in the performance by him of the part of the bank in any transaction, became notice to the bank, his principal; as it was his duty to give it notice thereof in that matter. It is the rule that the knowledge of the agent is the knowledge of his principal, and notice to the agent of the existence of material facts is notice thereof to the principal, who is taken to know everything about a transaction which his agent in it knows. This rule is sometimes stated so as to limit it to notice arising from, or at the time connected with, the subject-matter of his agency. Such notice must have come to the agent, it is said, while he is concerned for the principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it. This limitation, however, applies more particularly to the case of an agent whose employment is shortlived, so that the principal shall not be affected by knowledge that came to the agent before his employment began, nor after it was terminated. But where the agency is continuous, and concerned with a business made up of a long series

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of transactions of a like nature, of the same general character, it will be held that knowledge acquired as agent in that business in any one or more of the transactions, making up from time to time the whole business of the principal, is notice to the agent and to the principal, which will affect the latter in any other of those transactions in which that agent is engaged, in which that knowledge is material. . . . That Ganson held triple relations to the matter did not alter his relation to the bank, his principal, nor did it hinder his knowledge acquired as an agent from affecting his principal in the part he took as an agent. The subject-matter of his agency was the conduct and direction of the affairs of this bank. He represented the bank in all these transactions. He was every time of them engaged in the business of the bank. Notice to him while so engaged, though no otherwise received than by the possession of knowledge acquired by him while acting in another capacity, was notice to the bank. That is a necessary result of his triple character."

Elwell v. Chamberlin related to the exchange of a note, in respect of which fraud was charged. The court said: "It is not material that the plaintiffs authorized or knew of the alleged fraud committed by their agent Mills in negotiating the sale of the note. They cannot be permitted to enjoy the fruits of the bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation. They have ratified the sale by seeking to enforce payment of the check given for the thing sold. If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may, no doubt, rescind, when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefits of the dealing, he cannot claim immunity, on the ground that the fraud was committed by his agent and not by himself."

These cases, so far as they relate to sureties, rest upon the principle that, "if a *party* taking a guaranty from a surety conceal from him facts which go to increase his risk and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to

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a fraud, because the party is bound to make the disclosures, and the omission to make them under such circumstances is equivalent to an affirmation that the facts do not exist." 1 Story's Equity Jurisprudence, § 215. And the cases of *Fea-
zie v. Williams*, *Bennett v. Judson*, *National Life Ins. Co.
v. Minch*, *Holden v. New York & Erie Bank*, and *Elwell v.
Chamberlin*, rest upon the presumption, which the law in-
dulges, that an agent will inform his principal of what it is
his duty to communicate to the latter. *The Distilled Spirits*,
11 Wall. 356, 367; *Davis Imp. Wrought Iron Wagon Wheel
Co. v. Davis Wrought Iron Wagon Co.*, 20 Fed. Rep. 699, 701.
This rule is fully stated in Story on Agency, § 140, in which
the author says that "notice of facts to an agent is construc-
tive notice thereof to the principal himself, where it arises
from or is at the time connected with the subject-matter of
his agency; for, upon general principles of public policy, it is
presumed that the agent has communicated such facts to the
principal; and if he has not, still the principal having entrusted
the agent with the particular business, the other party has a
right to deem his acts and knowledge obligatory upon the
principal; otherwise, the neglect of the agent, whether de-
signed or undesigned, might operate most injuriously to the
rights and interests of such party."

Without stopping to consider whether each of the above
cases was correctly decided, it may be observed that those
relating to sureties in bonds given to corporations arose di-
rectly between the sureties and corporations represented by
*their boards of directors or by some of their officers acting
within the authority conferred upon them*; and that those
relating to the liability of a principal by reason of the acts
or representations of his agent, arose out of the agent's acts
or declarations *in the course of the business entrusted to
him*.

None of the cases cited embrace the present one. In the
first place, the procuring of a bond for O'Brien, in order that
he might become qualified to act as cashier, was no part of
the business of the bank nor within the scope of any duty
imposed upon Collins as president of the bank. It was the

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business of O'Brien to obtain and present an acceptable bond. And it was for the bank, by its constituted authorities, to accept or reject the bond so presented. The bank did not authorize Collins to give, nor was it aware that he gave, nor was he entitled by virtue of his office as president to sign, any certificate as to the efficiency, fidelity or integrity of O'Brien. No relations existed between the bank and the Surety Company until O'Brien presented to the former the bond in suit. What therefore Collins assumed in his capacity as president to certify as to O'Brien's fidelity or integrity, was not in the course of the business of the bank nor within any authority he possessed. He could not create such authority by simply assuming to have it. The Circuit Court of Appeals, speaking by Judge Lacombe, well said that there were many acts which the president of a bank may do without express authority of the board of directors, in some cases because the usage of the particular bank impliedly authorized them, in other cases because such acts were fairly within the ordinary routine of his business as president; but that the making of a statement, as to the honesty and fidelity of an employé for the benefit of the employé, and to enable the latter to obtain a bond insuring his fidelity, was no part of the ordinary routine business of a bank president, and there was nothing to show that by any usage of this particular bank such function was committed to its president.

It must therefore be taken, as between the bank and the company, that the former cannot be deemed, merely by reason of Collins' relation to it, to have had constructive notice that he as president gave the certificate in question.

The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or

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having received notice of them, failed to disavow what was assumed to be said and done in his behalf.

In *Henry v. Allen*, 151 N. Y. 1, 10, the court recognized the general rule. But after observing that it rested upon the agent's duty to disclose such facts to his principal, it held that one of the exceptions was that where the agent was "engaged in a scheme to defraud his principal, the presumption does not prevail, because he cannot in reason be presumed to have disclosed that which it was his duty to keep secret, or that which would expose and defeat his fraudulent purpose."

To the same effect are *Benedict v. Arnoux*, 154 N. Y. 715, and *Kettlewell v. Watson*, 21 Ch. Div. 685, 707. In the latter case it was said that the presumption arising from the duty of the agent to communicate what he knows to his principal "may be repelled by showing that, whilst he was acting as agent, he was also acting in another character, viz., as a party to a scheme or design of fraud, and that the knowledge which he attained was attained by him in the latter character, and that therefore there is no ground on which you can presume that the duty of an agent was performed by the person who filled that double character."

In *Commercial Bank v. Cunningham*, 24 Pick. 270, 276, which involved the question whether certain notes held by a bank were to be deemed to have been made for the accommodation of a firm, one member of which was a director of the bank at the time the notes were taken, it was held that the knowledge of the latter, although a director, was no proof of notice to the corporation, "especially as he was a party to all these contracts, whose interests might be opposed to that of the corporation." This principle is reaffirmed in *Innerarity v. Merchants' National Bank*, 139 Mass. 332, 333, in which the court said: "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily

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prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating" — citing *Kennedy v. Green*, 3 Myl. & K. 699; *Cave v. Cave*, 15 Ch. D. 639; *In re European Bank*, L. R. 5 Ch. App. 358; *In re Marseilles Extension Railway*, L. R. 7 Ch. App. 161; *Atlantic National Bank v. Harris*, 118 Mass. 147; *Loring v. Brodie*, 134 Mass. 453.

In *Terrell v. Branch Bank of Mobile*, 12 Alabama, 502, 507, the question was as to the liability of the maker of a note executed in blank and delivered by him to a director of a bank to be filled up with a certain sum, and to be used in the renewal of a note of the maker already held by the bank. The director (Scott) filled up the note for a larger amount and had it discounted for his own use, he acting as one of the directors when the discount occurred, but concealing the facts from the other directors. It was contended that the knowledge of Scott as director of the circumstances under which the note was made and offered for discount, his connection with the directory, and his presence when it was discounted by the bank, were in law a notice to the other directors of the facts. The Supreme Court of Alabama said: "It cannot be admitted that in receiving the blank of the defendant to be used for his benefit, Scott acted as the agent of the bank; and certainly he did not thus act in abusing the authority conferred on him by the defendant. But in filling up the blank for a larger amount than his authority required, and then offering the note for discount, he was in reality the representative of his own interest. *Pro re nata*, his powers as a director were suspended — he was contracting with the bank through his associates in the directory — he was borrowing, not lending its money — though a member of the board and present too, it cannot be supposed that he coöperated with them in purchasing paper of which he was the avowed proprietor; and whether he did or not, it cannot be presumed that he made any disclosure which would prejudice his application for a loan."

In his treatise on Equity Jurisprudence, Pomeroy says: "It is now settled by a series of decisions possessing the highest

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authority that when an agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then under such circumstances the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed." Vol. 2, § 675.

Further citation of authorities would seem to be unnecessary to support the proposition that if Collins gave the certificate that he might, with the aid of O'Brien as cashier, carry out his purpose to defraud the bank for his personal benefit, the law will not presume that he communicated to the bank what he had done in order to promote the scheme devised by him in hostility to its interests. In our judgment the Circuit Court of Appeals correctly held that plaintiff's right of action on the bond was not lost because its president, Collins, made to the defendants false representations as to the cashier's honesty; and that when two officers of a corporation have entered into a scheme to purloin its money for the benefit of one of them, "in pursuance of which scheme it becomes necessary to make false representations to a third person ostensibly for the bank, but in reality to consummate such scheme and for the benefit of the conspirators, and not in the line of ordinary routine business of such officers and without express authority, the corporation being ignorant of the fraud, the officers are not in thus consummating such theft the agents of the corporation."

It is contended that admitting in evidence Collins' ledger account and the letter book was error to the prejudice of the substantial rights of the defendant. We cannot assent to this view, and as the matter was satisfactorily disposed of by the Circuit Court of Appeals, it is sufficient to refer to the opinion of that court for our views on this point.

It is said the claim or proof of loss mailed to the company on June 24, 1892, and the receipt of which was acknowledged July 8, 1892, was not served as soon as practicable

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after the discovery of a loss for which the company was liable, nor within six months after the expiration or cancellation of the bond. We cannot assent to these propositions. It must be assumed from the verdict that, within the meaning of the bond, the loss was discovered the latter part of May, and that written notice of it was given as soon thereafter as was practicable. As, for the reasons heretofore stated, O'Brien did not retire from the service of the bank prior at least to December 29, 1891, it is clear that the objection under consideration is not well taken. Under the facts found, it must be held that proper notice of the loss was given as soon as practicable after the discovery of the fraud of O'Brien and within six months after his retirement from the service of his employer, and that the claim was made in such form as to reasonably inform the company of its nature. When received, no objection was made that notice of it was not served in time, nor that it was not sufficiently full to indicate the grounds upon which the receiver would proceed against the company upon its bond.

Having considered all the questions which, in our judgment, need to be examined, and perceiving no error of law in the record to the prejudice of the substantial rights of the Surety Company, the judgments of the Circuit Court and the Circuit Court of Appeals are

Affirmed.
